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89-1894

No.

Supreme Court, U.S.
FILED
APR 25 1990
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1989

CEFERINO COLOMA,
Petitioner,

VS.

DIRECTOR, OFFICE OF WORKERS
COMPENSATION PROGRAMS,
Respondent,

CHEVRON SHIPPING CO.,
Intervenor.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

This petition concerns federal maritime jurisdiction, and requests an interpretation of the "status" provisions of the Longshore and Harbor Workers' Compensation Act ("LHWCA"). 33 U.S.C. § 902(3). It raises two questions under Supreme Court Rule 17.

(1) Are *Weyerhauser Co. v. Gilmore*[1] and the traditional, "significant relationship" test for "maritime employment" still good law, as the Eleventh and Fifth Circuits held as recently as March 7, 1990, or were they reversed *sub silento* by *Herb's Welding, Inc. v. Gray*[2], as the Ninth Circuit ruled in its decision below?

(2) Do longshoremen, ship repairmen, shipbuilders, and shipbreakers comprise only "a part of the larger group of activities that make up 'maritime employment' ", as this Court held in *P.C. Pfeiffer Co., Inc. v. Ford*,[3], or does the LHWCA exclude all those "employees who are not engaged in loading, unloading, repairing, or building a vessel", as the Supreme Court suggested in *Herb's Welding?*

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[1] 528 F.2d 957 (9th Cir. 1975).

[2] 470 U.S. 414 (1985).

[3] 444 U.S. 69, 77, n. 7 (1979).

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DECISION BELOW

Review is hereby sought of a decision of the United States Court of Appeals for the Ninth Circuit which was entered on February 23, 1990, and will be reported at 897 F.2d 394 (9th Cir. 1990).[4]

[4] *Ceferino Coloma v. Director, Office of Workers Compensation Programs*, Slip Opinion No. 88-7445 (9th Cir. 1990), *aff'g* Decision and Order (and Order denying reconsideration) of Benefits Review Board, U.S. Department of Labor, 21 B.R.B.S. 318 (BRB, 1988), *aff'g* Decision and Order Affirming Administrative Law Judge, 21 B.R.B.S. 200 (BRB, 1988), *aff'g* Decision and Order Denying Benefits (and Order denying reconsideration) of Administrative Law Judge, U.S. Department of Labor, 18 B.R.B.S. 434 (ALJ, 1986).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1988).

STATUTE INVOLVED

The statute involved is 33 U.S.C. § 902(3) (1972).[5] That section enacts the so-called "status" requirement for LHWCA coverage, and provides that:

> "*The term 'employee' means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker*, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net."

33 U.S.C. 902(3) (1972) [emphasis added].

The Slip Opinion of the Court of Appeals is reproduced as Appendix A to this petition; the Order denying reconsideration and Decision and Order of the Benefits Review Board are reproduced as Appendices B and C hereto; the Order Denying Reconsideration and Decision and Order Denying Benefits of the Administrative Law Judge are reproduced as Appendices D and E hereto.

[5] Section 2(3) was amended prospectively in 1984. *See* Public Law 98-426. Though this claim arose prior to that amendment, the italicized language at issue in this case has remained the same since 1972, when it was enacted by Congress to define the so-called "status" requirement for LHWCA coverage. The 1984 amendments serve only to modify that language by specific exclusion.

SUMMARY OF PETITION

I must go down to the seas again,
to the lonely sea and sky,
And all I ask, oh Lord above,
is a star to steer me by.

— JOHN MASEFIELD

Though they flow from a Constitutional source,[6] the shoal waters of admiralty have never been easy to navigate. "The precise scope of admiralty jurisdiction is not a matter of obvious principle or of very accurate history." *United States v. Evans,* 195 U.S. 361, 365 (1906). As an arm of that imprecise jurisdiction, the exact reach of the LHWCA has been particularly unclear. *See gen.* Gilmore & Black, *The Law of Admiralty* (2d ed.) 418-423. Until 1972, it was strewn with "maritime but local" exceptions (*e.g., Western Fuel Co. v. Garcia,* 257 U.S. 233 (1921)), and overshadowed by an obscure "twilight zone". *Davis v. Dept. of Labor & Industries,* 317 U.S. 240 (1942). Since 1972, LHWCA coverage has revolved around the double tests of "situs" and "status". 33 U.S.C. §§ 902(3) and 903(a).[7] Unfortunately, as Justice Kennedy foretold back in 1978, "neither test is precise, and cases will often arise which present questions of coverage that are difficult to resolve." *Brady-Hamilton Stevedore Co. v. Herron,* 568 F.2d 137, 140 (9th Cir. 1978). After piloting their cases through those difficult questions for almost two decades, puzzled practitioners are still searching for a star to steer by. Our petition respectfully requests the Supreme Court to give us that star, and to realign the LHWCA, once and for all, with the overarching firmament of admiralty.

In 1972, the same year that the "situs" and "status" requirements were added to the LHWCA, this Court ruled that before admiralty jurisdiction attaches to an overwater tort, "there must also be a maritime nexus—some relationship between the tort and

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[6] Article III, Section 2, of the Constitution confers "all Cases of Admiralty and maritime Jurisdiction" upon the courts of the United States.

[7] These are commonly known as the " '72 amendments".

traditional maritime activities involving navigation or commerce on navigable waters." *Executive Jet Aviation, Inc. v. City of Cleveland,* 409 U.S. 249, 256 (1972). That decision clarified 159 years of conflicting jurisdictional law, and handed down a simple standard which has been followed ever since. Two years later, in 1975, the Ninth Circuit Court of Appeal interpreted the '72 amendments in light of *Executive Jet,* and ruled "that for an injured employee to be eligible for federal compensation under LHCA, his own work . . . must have a realistically significant relationship to 'traditional maritime activity involving navigation and commerce on navigable waters' ". *Weyerhauser Co. v. Gilmore,* 528 F.2d 957, 961 (9th Cir. 1975), *cert. den.,* 429 U.S. 868 (1979). *Weyerhauser* was followed by five maritime circuits, and served as a steady coverage beacon for almost 15 years.

By its decision below, the Ninth Circuit abandoned *Weyerhauser* on grounds that to do otherwise "would be to ignore the clear and direct mandate" of *Herb's Welding, Inc. v. Gray,* 470 U.S. 414 (1985). Appendix A, pp. A-9-A-13. In the opinion of the Court of Appeal, *Herb's Welding* narrowly restricts LHWCA "status" to "those actually involved in moving cargo between ship and land transportation." *Id.,* p. A-9. We respectfully petition this Court to examine the wisdom of abandoning *Weyerhauser,* and to consider whether *Herb's Welding* really made the remedial embrace of the LHWCA that much smaller than the jurisdictional ambit of the admiralty and *Executive Jet.* We also ask the Court to eliminate a conflict between the Fifth and Eleventh Circuits, on the one hand, and the Ninth Circuit on the other. We finally request the Court to clarify conflicting language from its own opinions in *P.C. Pfeiffer* and *Herb's Welding.*

STATEMENT OF THE CASE

I. Proceedings Below

This case comprises petitioner Ceferino Coloma's LHWCA claim against his former employer, the Chevron Shipping Company ("Chevron"). The parties stipulated that Coloma was injured on a maritime situs, and the Administrative Law Judge

("ALJ") concluded that "claimant's work was in aid of Chevron's seafaring and navigational activities". Appendix E, p. A-30. While that conclusion clearly satisfied *Weyerhauser,* the ALJ denied coverage under *Herb's Welding* on grounds that claimant was not "actually involved in moving cargo between ship and land transportation." *Id.,* p. A-28. The decision and order were entered on May 21, 1986. *Id.* Coloma appealed to the Benefits Review Board ("BRB"), which affirmed the ALJ on August 12, 1988. Appendix C. When the BRB denied a petition for reconsideration on October 27, 1988 (Appendix B), Coloma took his case to the Ninth Circuit Court of Appeal. The Ninth Circuit affirmed the BRB on February 23, 1990, and ruled that Weyerhauser had been overturned *sub silento* by *Herb's Welding.* Appendix A.

II. Material Facts

The material facts were undisputed. Ceferino Coloma was a ship's cook. After twenty years as a Navy steward, Coloma retired and obtained a "Z card" so he could sign on with the merchant marine. RT 53:12-19; 54:1-5; 58:1-15.[8] Coloma went to work for Chevron USA ("CUSA") as a galleyhand aboard seagoing tankers in 1974. RT 57:24-25; 56:1-21; 62:14-16. In January, 1975, Chevron transferred him to the "Operations, Ports and Navigation Department", and assigned him to the Longwharf at its Richmond, California refinery. RT 63:1-4. The Richmond Longwharf extends more than a quarter mile into San Francisco Bay, and is used to load and unload tankers. RT 28:8-12; 30:15-22. Like all liquid cargo operations, loading and unloading at the Longwharf is not conducted by independent stevedores or longshoremen, but through pumps, hoses, and pipes operated directly by the tanker crews. RT 30:23-25. Coloma fed those crews in a wharf-top mess hall known as the "Seagull Inn". RT 68:4-6. Most of the Inn's employees carried "Z cards". RT 64:15-65:7. Indeed, Coloma was sent there to replace a cook whom Chevron had transferred to permanent fleet duty. RT 62:17-24.

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[8] Though we have not included the Reporter's Transcript among the appendices, we have still cited the record ("RT") for ease of reference in the event that our petition is granted.

The primary purpose of the Seagull Inn was to feed seamen from visiting tankers. RT 22:20-24. Coast Guard regulations require ship's crew to remain aboard during cargo operations (46 C.F.R. § 35.35-1), so the Seagull Inn was established to feed them dockside while the vessel's regular galleyhands took shore leave. RT 23:13-17. Crewmen dined there for free under the room-and-board provisions of their employment contracts. RT 27:8-9. Since the Longwharf is behind refinery fences, the Inn is not accessible to the public. RT 35:11-19. Besides tanker and tugboat crews, the only people permitted to eat there were Coast Guard officers, customs officials, and outside ship-repair contractors. RT 25:6-25; 26:1-6.

In 1982, Chevron closed the Inn, and transferred most of the messmen to shipboard galleys. RT 63:9-12. Today, visiting tankers either require their galleyhands to remain aboard, or send their crews to the refinery cafeteria about a mile up the road. RT 36:20-25; 37:1-6. Coloma was reassigned to the CUSA tanker *Hilyer Brown* on July 14, 1982. Before leaving, however, he contracted benign keratoma with lichenoid dermatitis on both hands from the chemical cleansers he used at the Inn. RT 70:7-10. He was medically discharged from the *Hilyer Brown* on July 23, 1982, as a result of that condition. RT 61:1-3.

Coloma was a "seaman" under the Jones Act (46 U.S.C. § 688(a)) during his service aboard CUSA tankers,[9] and he was a "maritime employee" under *Weyerhauser* during his interim service on the Richmond Longwharf. Only the decision to abandon *Weyerhauser* left him high and dry. We respectfully petition the Court to review that decision.

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[9] *See, e.g., Troupe v. Chicago, Duluth & Georgian Bay Transit Co.*, 234 F.2d 253 (2nd Cir. 1956); *Marshall v. International Mercantile Marine Co.*, 39 F.2d 551 (2nd Cir. 1930).

REASONS FOR GRANTING THE WRIT

I. THE DECISION TO ABANDON *WEYERHAUSER* CONFLICTS WITH THE OPINIONS OF TWO OTHER FEDERAL COURTS OF APPEAL, AND DECIDES AN IMPORTANT QUESTION OF LAW

The Court of Appeal decided an important question of law when it interpreted Section 902(3) under what it took to be "the more restrictive standard" of *Herb's Welding*, and abandoned the traditional *Weyerhauser* test. Appendix A, p. A-12. It thereby rejected a whole generation of circuit court cases which "define the phrase 'maritime employment' as a 'general' and 'catch-all' phrase".[10] Relying instead on a Louisiana District Court opinion, "It concluded . . . that the Supreme Court views 'expansive notions' of what is maritime 'with disfavor'." *Id., quoting West v. Chevron USA, Inc.*, 615 F.Supp. 377, 381 (E.D.La. 1985). This conclusion conflicts sharply with the Supreme Court's assiduous admonition that:

> "The language of the 1972 Amendments is broad and suggests that we should take an *expansive* view of the extended coverage. * * * The Act 'must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results.' *Voris v. Eikel*, 346 U.S. 328, 333 (1953)." *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249, 268 (1977) [emphasis added]. *See also Director, OWCP v. Perini North River Assoc.*, 459 U.S.

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[10] *See, e.g., Hullingshorst Industries, Inc. v. Carrol*, 650 F.2d 750, 755 (5th Cir. 1981); *Jacksonville Shipyard, Inc. v. Perdue*, 539 F.2d 533, 540 (5th Cir. 1976); *Schwabenland v. Sanger Boats*, 683 F.2d 309 (9th Cir. 1982); *Duncanson-Harrelson Co. v. Director, OWCP*, 644 F.2d 827 (9th Cir. 1981); *Duncanson-Harrelson Co. v. Director, OWCP*, 686 F.2d. 1336 (9th Cir. 1982); *LeMelle v. B.F. Diamond*, 674 F.2d 296 (4th Cir. 1982); *Miller v. Central Dispatch, Inc.*, 673 F.2d 773 (5th Cir. 1981); *Mississippi Coast Marine v. Bosarge*, 637 F.2d 994 (5th Cir. 1981); *Odom Construction Co. v. U.S. Dept. of Labor*, 622 F.2d 110 (5th Cir. 1980); *Smith v. Eastern Seaboard Piledriving, Inc.*, 604 F.2d 789 (2nd Cir. 1979); *Ramos v. Universal Dredging Corp.*, 653 F.2d 1353 (9th Cir. 1981); *Ward v. Director, OWCP*, 684 F.2d 114 (5th Cir. 1982); *Trotti & Thompson v. Crawford*, 631 F.2d 1214 (2nd Cir. 1980); *Weyerhauser Co. v. Gilmore, supra.*

297, 315-16 (1983); *Baltimore & Phil. Steamboat Co. v. Norton,* 284 U.S. 408, 414 (1932).

As we saw earlier, the decision to abandon *Weyerhauser* also snuffs a coverage beacon that had shone steadily since 1975, and leaves the sweep of LHWCA coverage out of phase with that of general admiralty jurisdiction. *See Executive Jet Aviation, Inc. v. City of Cleveland, Ohio, supra.* Does this mean that the courts of appeal must rewrite almost fifteen years' worth of coverage jurisprudence? Only the Supreme Court can answer that important federal question. Clearly, if there really has been a sudden, restrictive shift from the "expansive view" traditionally accorded the Act, this Court should say so specifically under Supreme Court Rule 17(c).

The decision below also creates a conflict among the circuits. Though the Ninth Circuit has abandoned *Weyerhauser,* the Fifth Circuit and the Eleventh Circuit still consider it good law. The Eleventh Circuit decision on point is *Sanders v. Alabama Dry Dock & Shipbuilding Co.,* 841 F.2d 1085 (11th Cir., 1988). Like the decision below, *Sanders* was decided after *Herb's Welding.* But, unlike the decision below, *Sanders* refused to restrict the phrase "maritime employment" to those trades generally enumerated on the face of the statute. *Id.*, 841 F.2d at 1088. It interpreted that phrase under the progeny of *Weyerhauser. Id., citing Odom Const. Co. v. U.S. Dept. of Labor, supra.*[11] The decision below, however, "decline[d] to accord precedential value to the *Sanders* decision." Appendix A, p. A-12, fn. 10. This created a conflict among the circuits under Supreme Court Rule 17(a).

The Fifth Circuit compounded that conflict last March 7 when it handed down its opinion in *Union Texas Petroleum v. PLT Engineering, Inc.,* 895 F.2d 1043 (5th Cir. 1990). Like *Sanders, Texas Petroleum* stood by the *Weyerhauser* coverage test notwithstanding *Herb's Welding.* To quote the Fifth Circuit:

> "As always, the lessons of prior cases must be applied in deciding new cases that arise under different statutes. Under

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[11] *See* footnote 10 *supra.*

> the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §§ 901-950, coverage may extend beyond admiralty's boundaries. *However, the threshold question under . . . LHWCA is: does the dispute arise out of traditional maritime activity?* Thus, while the LHWCA was not intended to 'cover all those who breathe salt air," neither was [it] intended to exclude them all. *See Herb's Welding, Inc. v. Gray,* [*supra,* 470 U.S. at 414]." *Id.,* 895 F.2d at 1049, fn. 9 emphasis added].

The Fifth Circuit's position also conflicts with the decision below. We respectfully urge the Court to resolve this conflict under Rule 17(a).

II. *CERTIORARI* IS REQUIRED TO ESTABLISH WHETHER LHWCA COVERAGE MUST NOW BE MEASURED BY A "RESTRICTIVE STANDARD" WHICH IS FAR NARROWER THAN THAT TRADITIONALLY ACCORDED THE ADMIRALTY

As we saw earlier, the courts have been riddling with Longshore coverage since the statute was enacted in 1927. *See* Gilmore & Black, *supra,* 408-23. A respected commentator has described their early efforts as "one of the most depressing branches of federal jurisprudence". *Id.,* 420. Well-meaning but imprecise amendments in 1972 (Pub. L. 92-576) and 1984 (Pub. L. 98-426) did little to solve that conundrum. At best, they may be said only to have exchanged the old puzzle of "twilight zones" and "maritime but local" exceptions for the modern perplex of "situs" and "status".

The story behind the Act's amendments has been told well and often elsewhere. *See, e.g., Northeast Marine Terminal Co., Inc. v. Caputo, supra,* 432 U.S. at 256-73. It will suffice for our purposes merely to note that they "changed what had been essentially only a 'situs'[12] test of eligibility for compensation to one looking to both the 'situs' of the injury and the 'status' of the injured." *Id.,*

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[12] *I.e.,* whether the accident occurred on navigable waters seaward of the so-called "*Jensen* line". *Southern Pacific Co. v. Jensen,* 244 U.S. 205 (1917); *Nacriema Operating Co. v. Johnson,* 396 U.S. 212 (1969).

432 U.S. at 264-65. This, of course, is the double-barrelled approach which Justice Kennedy once termed "difficult to resolve." *Brady-Hamilton Stevedore Co. v. Herron, supra,* 568 F.2d at 140. Since Coloma was injured on a covered pier, our difficulties concern only the question of status.

Status is the occupational component of LHWCA coverage, and queries whether the claimant is a "maritime employee". "The question is made difficult by the failure of Congress to define the relevant terms . . . in either the text of the Act or its legislative history.[13] *Northeast Marine Terminal Co., Inc. v. Caputo, supra,* 432 U.S. at 265. The appellate confusion which grew out of this legislative failure has required Supreme Court clarification on no fewer than six occasions over the last thirteen years.[14] That's because Congress, and hence the Court, tried to solve the problem on a piecemeal basis. They tried to define "maritime employment" through specific example rather than general description.[15] But, just like the proverbial elephant which, when approached from different directions in a fog, seems either a tree, a wall, or a rope, the ill-lit Longshore Act presents a different face to almost

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[13] As Professors Gilmore and Black complained: "The Reports do not read as if they have been divinely inspired. As essays in statutory construction, they do not commend themselves." Gilmore & Black, *supra,* 430."

[14] Those six cases include: *Northeast Marine Terminal Company, Inc. v. Caputo, supra; P.C. Pfeiffer Company, Inc. v. Ford,* 444 U.S. 69 (1979); *Sun Ship, Inc. v. Pennsylvania,* 447 U.S. 715 (1980); *Director, OWCP v. Perini North River Associates, supra; Herb's Welding, Inc. v. Gray, supra;* and *Chesapeake and Ohio Ry. Co. v. Schwalb,* ____ U.S. ____, 110 S.Ct. 381 (1989).

[15] The uninspired Committee Reports, for example, merely state that the Act was intended to cover "longshoremen, harbor workers, ship repairmen, shipbuilders, shipbreakers and other employees engaged in maritime employment." H.R. Rep. No. 92-1441, 92d Cong., 2d Sess., *reprinted in 1972 U.S. Code Cong. & Admin. News,* 4708. This, in turn, was the very report which this Court looked to perforce for the rationale of its 5-4 opinion in *Herb's Welding (supra,* 70 U.S. at 423-24), to take just one example.

everyone on the waterfront. That's why the status question has remained so elusive.

Of the six Supreme Court coverage decisions since 1972, only one took a far-seeing, non-piecemeal approach—*Director, OWCP v. Perini North River Assoc., supra. Perini* stepped back from the myopic riddle of "maritime employment", and held "that when a worker is injured on the actual navigable waters in the course of his employment on those waters, he satisfied the status requirement in Section 2(3), and is covered under the LHWCA" no matter what his job was at the time. *Id.*, 459 U.S. at 324. This holding was based on the sweeping conclusion that "Congress was concerned with injuries on land, and assumed that injuries occurring on the actual navigable waters were covered, and would remain covered" under the modern amendments. *Id.*, 459 U.S. at 319.

Perini put an end to a long debate. Unlike the still-confusing situation ashore, there has never been need for another Supreme Court opinion clarifying coverage on navigable waters. *Perini* gave courts and counsel a star to steer by. The apparently endless round of shoreside coverage questions shows only that dockworkers like Ceferino Coloma need a similar case to shine over them. As we saw at the outset, this Court hung just such a shining rule over the admiralty when it handed down *Executive Jet.* And that, in turn, was the rule that *Weyerhauser* steered by.

Weyerhauser was the first appellate opinion to consider the LHWCA's ill-defined "status" requirement. 528 F.2d at 959. After examining the Committee Reports, the statute, the amendments, and their place and purpose under the larger firmament of maritime law, *Weyerhauser* concluded that "[t]he 1972-amended prerequisite of 'maritime employment' is a clearly expressed congressional perpetuation of the essential element of admiralty jurisdiction over the employee." *Id.*, 528 F.2d at 961. It then erected a long-standing test:

> "We hold that for an injured employee to be eligible for federal compensation under LHCA, his own work and employment, distinguished from his employer's diversified operations, including maritime, must have a realistically

> significant relationship to 'traditional maritime activity involving navigation and commerce on navigable waters,' with the further condition that the injury-producing disability occurred on navigable waters or adjoining areas as defined in Section 903." *Id., quoting Executive Jet Aviation, Inc. v. City of Cleveland, Ohio, supra.*

We respectfully submit that the decision below not only made a grave error, but doomed the courts and counsel to still another round of obscure coverage cases, when it dismantled *Weyerhauser*, and denied Coloma coverage. That's why we have petitioned this Court for a writ of *certiorari*. The Act needs another *Perini*.

III. *CERTIORARI* IS FINALLY REQUIRED TO CLARIFY WHETHER LONGSHOREMEN, SHIP REPAIRMEN, SHIPBUILDERS AND SHIPBREAKERS COMPRISE ONLY "PART OF THE LARGER GROUP OF [MARITIME EMPLOYEES]," AS THIS COURT HELD IN *P.C. PFEIFFER*, OR WHETHER CONGRESS INTENDED TO EXCLUDE ALL THOSE "NOT ENGAGED IN LOADING, UNLOADING, REPAIRING OR BUILDING A VESSEL", AS THE SUPREME COURT RULED IN *HERB'S WELDING*

Back in 1979, this Court explained that longshoremen,[16] ship repairmen, shipbuilders and shipbreakers comprise only "a part of

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[16] The fact is that it's become a misnomer to call this the "Longshore Act". Back in 1962, before containerization and the '72 Amendments, "The Annual Report of the Maritime Administration ("MARAD") could count over 70,000 American longshoremen. *MARAD* (1962) 19. By 1985, that number had dwindled to 29,759. *MARAD* (1985) 37. Yet annual LHWCA filings rose dramatically over the same period of time. U.S. Dept. of Labor, Employment Standards Administration, *LHWCA: Annual Report on Administration of the Act* (1986) 28. In short, "longshore workers" are playing an ever smaller role under the Act which bears their name. If the Supreme Court has nonetheless "said that the 'maritime employment' requirement is 'an occupational test that focuses on loading and unloading' " (*Herb's Welding, supra*, 470 U.S. at 424), it's probably because it hasn't had occasion to consider

the larger group of activities that make up 'maritime employment' ". *P.C. Pfeiffer Co., Inc. v. Ford, supra*, 444 U.S. at 77, n. 7. In 1985, however, it observed that "[t]he Amendments were not meant 'to cover employees who are not engaged in loading, unloading, repairing, or building a vessel". *Herb's Welding, Inc. v. Gray, supra*, 470 U.S. at 424. This apparent conflict has created a great deal of confusion among the lower courts. For one thing, *Herb's Welding* makes no mention of "shipbreakers", though they're specifically enumerated on the face of the Act. 33 U.S.C. § 902(3). For another, and far more importantly, it appears to limit "maritime employment" to four narrow categories. But that doesn't fit the bustling reality of the modern waterfront.

"The almost infinite range of the conditions of waterfront employment has been detailed in thousands of cases." Gilmore & Black, *supra*, 430. Hundreds of those cases were decided after *Weyerhauser*. But just as the Ninth Circuit felt constrained to rewrite *Weyerhauser*, contradictory *dicta* from *Herb's Welding* could compel the courts of appeal to rewrite *Weyerhauser*'s progeny.

Under the old rule:

> "While Section 902(3) specifically grants coverage to longshoremen, harbor workers, shipbuilders, etc., the Act encompasses occupations beyond those specifically listed. Thus we look to the character of the work, whether the work is maritime, that is, *whether the employee's activities had a realistically significant relationship to traditional maritime activity*." *Miller v. Central Dispatch, Inc., supra*, 673 F.2d at 780-81 [*citing Weyerhauser v. Gilmore, supra*]. *See also*

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many covered "harbor worker" claims since the "status" requirement was first enacted. Of the six coverage cases which have been accepted for review since 1972, *Caputo, P.C. Pfeiffer*, and *Schwalb* all involved "longshore workers", while *Herb's Welding* concerned an oil worker injured on a stationary platform more than a mile out to sea. To be sure, *Perini* covered a harbor-working construction foreman, but only because he was injured afloat, and *Sunship* did no more, coverage-wise, than afford five injured shipyard employees the right to elect benefits under the state system. In sum, this case affords the Supreme Court its first opportunity to consider the coverage of a harbor worker injured ashore.

Hullinghorst Industries, Inc. v. Carroll, supra, 650 F.2d at 755; *Jacksonville Shipyard, Inc. v. Perdue, supra*, 539 F.2d at 540.

Over the last fifteen years, there have been a great many cases decided under that rule. The decision below has repealed it. We question whether it's really necessary to rewrite fifteen years' worth of Longshore law. Only this Court can answer that question.

WHEREFORE we respectfully urge the Supreme Court to grant our petition for *certiorari*.

Respectfully submitted,

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24 April 1990

Appendix A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 88-7445

CEFERINO COLOMA,
Petitioner,

v.

DIRECTOR, OFFICE OF WORKERS
COMPENSATION PROGRAMS,
Respondent.

OPINION

Petition for Review of an Order of the Benefits Review Board of the United States Department of Labor

Argued and Submitted
December 15, 1989 — San Francisco, California

Filed February 23, 1990

Before: Joseph T. Sneed, Procter Hug, Jr. and Edward Leavy, Circuit Judges.

Opinion by Judge Sneed

SUMMARY

Workers' Compensation

Affirming the Benefits Review Board's affirmation of the administrative law judge's denial of benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-50 (1982 & Supp. V 1987), the court held that a shipping company's messman and cook is not engaged in maritime employment under § 2(a) of the 1972 amendments to the Act.

Appellant Ceferino Coloma was employed as a messman and cook by the Chevron Shipping Company from 1974 to 1982. Between 1977 and 1982, he worked in the Seagull Inn, the Chevron crews mess on the Richmond Longwharf. Chevron closed the Inn in 1982, and Coloma was transferred to a seagoing tanker where he continued to prepare meals. In 1984, he filed a claim seeking benefits for permanent disability under the LHWCA. At a formal hearing before an administrative law judge, the parties stipulated that Coloma had developed a benign keratoma with lichnoid dermatitis on both hands, that this illness arose out of and in the course of his employment with Chevron, and that it resulted from repeated exposure to the harsh cleansing chemicals used by the company. It was also stipulated that Coloma's exposure to these chemicals occurred on a maritime situs and that the occupational illness had permanently disabled Coloma, preventing him from engaging in his accustomed trade. The ALJ denied benefits on the basis that, as a messman and cook, Coloma had not been a maritime employee under 33 U.S.C. § 902(3) as amended in 1972. The BRB affirmed, and Coloma appealed.

[1] With the 1972 amendments to the LHWCA, Congress inserted a status requirement which was, for the first time, clearly separate and distinct from the situs requirement. After this, the Act required that eligible workers be engaged in maritime employment. [2] In *Herb's Welding, Inc. v. Gray,* 470 U.S. 414 (1985), the Supreme Court stated that it had never read maritime employment to extend so far beyond those actually involved in moving cargo between ship and land transportation. [3] Coloma argued that the occupational test articulated in *Herb's Welding* is dicta and not binding authority in this case. The court disagreed. The Supreme Court had to define maritime employment in order to decide *Herb's Welding.* [4] In the alternative, Coloma argued that he is covered even if the *Herb's Welding* standard is applied, contending that his functions were essential to the longshoring operations of Chevron because the presence of the Seagull Inn permitted those crew members performing the loading and unloading duties to remain aboard the vessel during loading and unloading operations. This is not the case. The Seagull Inn closed in 1982, and Chevron has not been

forced to shut down its operations. Those crew members apparently now use a cafeteria located about a mile away or are fed by messmen who remain aboard the tanker. Coloma's functions were not essential to the loading and unloading process.

COUNSEL

John R. Hillsman, McGuinn, Hillsman & Palefsky, San Francisco, California, for the petitioner.

Mark H. Tune, Harbinson, Carlson & Tune, San Francisco, California, for the intervenor.

No appearance by counsel for respondent.

OPINION

SNEED, Circuit Judge:

Ceferino Coloma seeks benefits under the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §§ 901-50 (1982 & Supp. V 1987) for permanent disability sustained in the course of his employment with the Chevron Shipping Company (Chevron). Administrative Law Judge (ALJ) Karst denied benefits on the basis that Coloma's occupation of messmen and cook was not "maritime employment" under Section 2(a) of the 1972 amendments to the Act. The Benefits Review Board (BRB) affirmed the ALJ's decision. We affirm.

I.

FACTS AND PROCEEDINGS BELOW

Ceferino Coloma was employed as a messman and cook by the Chevron Shipping Company from 1974 to 1982. Coloma alleged that, as of about 1978, his hands hurt when wet. Coloma filed a claim on June 20, 1984, seeking benefits for permanent disability under the LHWCA. At a formal hearing before ALJ Karst, the parties stipulated that Coloma had developed a benign keratoma with lichnoid dermatitis on both hands, that this illness arose out of and in the course of Coloma's employment with Chevron, and that it resulted from repeated exposure to the harsh cleansing

chemicals used by the company. The parties stipulated further that Coloma's exposure to these chemicals occurred on a "maritime situs," and that the occupational illness had permanently disabled Coloma, preventing him from engaging in his accustomed trade.

In his May 21, 1986 decision and order, the ALJ accepted all of the above as true and determined that Coloma's claim should be considered pursuant to the 1972 Amendments to the LHWCA. *See* Pub. L. No. 92-576, 86 Stat. 1251, 1251 (1972).[1] The sole issue in dispute is whether Coloma's occupation as messman and cook constitutes "maritime employment" under Section 2(a) of the 1972 Amendments.[2] ALJ Karst, in his May 21, 1986 opinion, found that:

> Claimant is a 56-year-old former messman/cook. He served 20 years in that capacity with the U.S. Navy and five more with Chevron. Between 1977 and 1982, he worked in the "Seagull Inn", the Chevron "crews mess" on the Richmond Longwharf. Undisputed testimony . . . establishes that the primary function of the Seagull Inn was to provide meals to the officers and seamen of visiting Chevron tankers while their shipboard stewards took shore leave. The Seagull Inn also served the crews of Chevron's "Inland Fleet", the harbor tugs and barges ordinarily berthed at the Richmond

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[1] Although 33 U.S.C. § 902(c) was amended again in 1984, *see* Pub. L. No. 98-426, 98 Stat. 1639 (1984), the 1984 Amendments do not apply here. The ALJ concluded that Coloma's claim arose on July 28, 1982, when a physician explained to Coloma the relationship between his illness and his occupational chemical exposure. Therefore, his claim arose prior to the effective date of the 1984 Amendments.

[2] Section 2(1) of the 1972 Amendments defines a maritime employee as "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor worker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net." Pub. L. No. 92-576, § 2(a), 86 Stat. 1251, 1251 (1972).

> Longwharf, together with occasional visitors like Coast Guard officers, customs officials, harbor pilots, and outside contractors. Though these later, occasional visitors were charged for their meals, the seamen from Chevron's seagoing and inland fleets dined for free "in lieu of a meal allowance". Moreover, since the Seagull Inn is located on the Longwharf itself, within the gates of the Richmond refinery, it was never open to the general public.
>
> Undisputed testimony from the claimant and former Seagull Inn cook Miguel Presa establishes that Chevron closed the Inn in 1982, but transferred most of its employees to shipboard positions on tankers owned by respondent's corporate affiliate, Chevron, U.S.A., Inc., or "CUSA". Claimant himself was transferred to the sea-going CUSA tanker HILYER BROWN on July 14, 1982. Adam, Presa, and claimant all agree that, whether he worked ashore at the "Seagull Inn" or afloat on a CUSA tanker, claimant's duties were always the same, preparing and serving meals to hungry seamen.

The ALJ denied benefits on the basis that, as a messman and cook, Coloma had not been a "maritime employee" under 33 U.S.C. § 902(3) as amended in 1972. Relying on the Supreme Court's opinion in *Herb's Welding, Inc. v. Gray,* 470 U.S. 414 (1985), the ALJ stated that:

> Claimant's tasks of cleaning tables, washing dishes and cooking were neither "inherently maritime" nor were they significantly different from the tasks that are performed in dining halls, cafeterias and restaurants on land. . . . The evidence does not establish that claimant's employment involved any aspect of the process of *loading, unloading, repairing or building vessels.* Because the "Seagull Inn" principally fed seamen and not longshoremen, claimant's work was in aid of Chevron's seafaring and navigational activities, and not in aid of any longshoring functions performed on the wharf.

(Emphasis added.)

Coloma appealed to the Department of Labor's Benefits Review Board. In its August 12, 1988, review of the ALJ's decision, the BRB affirmed, also relying on *Herb's Welding*.

On appeal to this court, appellant asserts that the ALJ and BRB erred by applying the test articulated in *Herb's Welding*. He argues that the language from *Herb's Welding* adopted below is merely *dicta*, and need not be followed by this court. He entreats this court to apply instead the standard it articulated in *Weyerhaeuser Co. v. Gilmore*, 528 F.2d 957 (9th Cir. 1975), *cert. denied*, 429 U.S. 868 (1976). In *Weyerhaeuser*, we held that the occupational test under section 902(3) requires that the employee's job "have a realistically significant relationship to 'traditional maritime activity....'" *Id.* at 961 (citation omitted). Appellant asserts that there exists a "long and unbroken line" of cases applying *Weyerhaeuser*, and that we should not disturb such firmly entrenched precedent. Applying the *Weyerhaeuser* standard, he contends, he is eligible for benefits as a maritime employee.

In the alternative, appellant argues that he also meets the standard articulated by the Supreme Court. He argues that his job was "essential" to the overall loading and unloading process because Chevron's longshoring activities could not continue uninterrupted without his services. He points further to the result in *Chesapeake & Ohio Ry. Co. v. Schwalb*, 110 S. Ct. 381, 385 (1989), where, he contends, the Supreme Court held that a "janitor" is a maritime employee within the meaning of the statute. He argues that if a "janitor" is covered, then a messman/cook clearly is covered.

This court has jurisdiction of this matter pursuant to 33 U.S.C. § 921(c).

II.

STANDARD OF REVIEW

In reviewing the decision of the ALJ under 33 U.S.C. § 921(b), the "BRB must accept the ALJ's findings unless they are contrary to the law, irrational, or unsupported by substantial

evidence." *Todd Shipyards Corp. v. Black,* 717 F.2d 1280, 1284 (9th Cir. 1983), *cert. denied,* 466 U.S. 937 (1984). This court of appeals "scrutinizes [BRB] decisions for errors of law and for adherence to the statutory standard" described above. *Bumble Bee Seafoods v. Director, Office of Workers' Compensation Programs,* 629 F.2d 1327, 1329 (9th Cir. 1980). The BRB is not a policymaking body; therefore, "its interpretations of the LHWCA are not entitled to any special deference." *Todd Shipyards,* 717 F.2d at 1284.

III.

DISCUSSION

A. The Situs Requirement

Prior to the 1972 Amendments, the LHWCA provided compensation for the disability or death of an employee only where the employee's injury occurred on the "navigable waters of the United States (including any dry dock)...." Act of Mar. 4, 1927, Pub. L. No. 69-803 § 3(a), 44 Stat. 1424, 1426. With the Amendments, Congress extended the covered *situs,* which had previously "stopped at the water's edge." *Northeast Marine Terminal Co. v. Caputo,* 432 U.S. 249, 259 (1977). The amended Act covered also "any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel." Pub. L. No. 92-576, § 2(c), 86 Stat. 1251, 1251 (1972) (amending section 3(a) of the 1927 Act). This was the "situs" requirement.

B. The Status Requirement

[1] The 1972 Amendments also "describe[d] affirmatively the class of workers Congress desired to compensate."[3] *Northeast*

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[3] Prior to the 1972 Amendments, the LHWCA described a class of covered workers by exclusions; "The term 'employee' does not include the master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net." § 2(3), 44 Stat. at 1424, 1425 (1927).

Marine, 432 U.S. at 264. That is, Congress inserted a *status* requirement, which was, for the first time, clearly separate and distinct from the *situs* requirement. *P.C. Pfeiffer Co. v. Ford,* 444 U.S. 69, 79 (1979). After the 1972 Amendments, the Act required that eligible workers be "engaged in *maritime employment,* including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker . . . " § 2(a), 86 Stat. at 1251 (emphasis added). Employees clearly must meet both the *status* and *situs* requirements in order to be eligible for coverage. *See Chesapeake & Ohio Ry. Co. v. Schwalb,* 110 S. Ct. 381, 384-85 (1989); *Herb's Welding, Inc. v. Gray,* 470 U.S. 414, 423-24 (1985); *P.C. Pfeiffer,* 444 U.S. at 79. In the instant case, the parties do not dispute that Coloma meets the *situs* requirement. The dispute, rather, concerns whether he meets the *status* requirement.

Congress did not explicitly define terms such as "maritime employment" and "longshoremen" appearing in 33 U.S.C. 902(3). *See Northeast Marine,* 432 U.S. at 265. Relying on the Senate and House Reports, the Supreme Court concluded that Congress intended "to cover those workers involved in the essential elements of unloading a vessel — taking cargo out of the hold, moving it away from the ship's side, and carrying it immediately to a storage or holding area." *Id.* at 267. The Court emphasized further "that persons who are on the situs but are not engaged in the overall process of loading and unloading vessels are not covered." *Id.*

[2] In *Herb's Welding,* the Supreme Court firmly restated the applicable status test:

> [In enacting the maritime employment requirement,] Congress did not seek to cover all those who breathe salt air. Its purpose was to cover those workers on the situs who are involved in the essential elements of loading and unloading; it is "clear that persons who are on the situs but not engaged in the overall process of loading or unloading vessels are not covered." While "maritime employment" is not limited to the occupations specifically mentioned in § 2(3), neither can it be read to eliminate any requirement of a connection with

> the loading or construction of ships." As we have said, the "maritime employment" requirement is "an occupational test that focuses on loading and unloading." The Amendments were not meant "to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity." *We have never read "maritime employment" to extend so far beyond those actually involved in moving cargo between ship and land transportation.*

470 U.S. at 423-24 (emphasis added; citations and footnote omitted). And, if there were any doubt about the Supreme Court's view, that doubt was resolved by its recent opinion in *Chesapeake & Ohio Ry. Co.*[4]

[3] Appellant argues that the occupational test articulated in *Herb's Welding* is dicta, and therefore is not binding authority in the instant case. We disagree.[5] The Court had to define maritime

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[4] [I]t has been clearly decided that, aside from the [occupations specified in the statute], land-based activity occurring within the § 903 situs will be deemed maritime only if it is an integral or essential part of loading or unloading a vessel.

* * *

> ...[T]he maritime employment requirement as applied to land-based work other than longshoring and the other occupations named in § 902(3) is an occupational test focusing on loading and unloading. Those not involved in those functions do not have the benefit of the Act.

110 S. Ct. 384-85.

[5] There is general agreement in case law and legal encyclopedias that *obiter dicta* or dicta is " 'language unnecessary to a decision....' " *Lawson v. United States,* 176 F.2d 49, 51 (D.C. Cir. 1949), *cert. denied,* 339 U.S. 934 (1950); 20 Am. Jur. 2d *Courts* § 74 (1965); 21 C.J .S. *Courts* § 190 (1940). *See also Sarnoff v. American Home Prod. Corp.,* 798 F.2d 1075, 1084 (7th Cir. 1986) ("A dictum is a statement in a judicial opinion that could have been deleted without seriously impairing the analytical foundations of the holding....").

employment in order to decide *Herb's Welding* because the question there was whether the occupational duties of a welder injured while working on a fixed platform in Louisiana waters constituted maritime employment under the Act.[6]

Appellant asserted in oral argument that there was "no mention of the significant relationship test in *Herb's Welding*," and thsu argues that the Supreme Court did not intend *Herb's Welding* to reverse the law of circuits applying *Weyerhaeuser*-type standards. Appellant is wrong. In *Herb's Welding*, the Supreme Court reversed the Fifth Circuit, which had applied the *Weyerhaeuser* test, as adopted in a 1980 Fifth Circuit case.[7] In so doing, the Court stated that "[t]he Fifth's Circuit's expansive view of maritime employment is ... inconsistent with our prior cases under the 1972 Amendments to the LHWCA." 470 U.S. at 423. It then proceeded to substitute its "essential elements of loading and unloading" test for the *Weyerhaeuser* "significant relationship" test. In *Herb's Welding*, the Supreme Court went beyond

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[6] The Court concluded that:

> [Gray's] work had nothing to do with the loading or unloading process, nor is there any indication that he was even employed in the maintenance of equipment used in such tasks.... He built and maintained pipelines and the platforms themselves. There is nothing inherently maritime about those tasks. They are also performed on land, and their nature is not significantly altered by the maritime environment....
>
> ...To hold that Gray was necessarily engaged in maritime employment because he was on a drilling platform would ignore Congress' admonition that not everyone on a covered situs automatically satisfies the status test.

470 U.S. at 425 (footnote omitted).

[7] The Fifth Circuit, in *Herb's Welding, Inc. v. Gray*, 703 F.2d 176, 179 (5th Cir. 1983), relied on the test set forth in *Odom Constr. Co. v. United States Dep't of Labor*, 622 F.2d 110, 113 (5th Cir. 1980), *cert. denied*, 450 U.S. 966 (1981). The Fifth Circuit panel in *Herb's Welding* read the *Odom* test as requiring employees to show that their employment had a "realistically significant relationship to traditional maritime activity" in order to obtain coverage under Section 902(3). *Id.*

merely rejecting the Fifth Circuit's *application* of the "significant relationship" test; it rejected the test itself. Furthermore, in *Chesapeake & Ohio Ry. Co.*, the Court explicitly granted certiorari to resolve the conflict between the position adopted by Virginia Supreme Court, the lower court in that case, and several federal circuits. 110 S. Ct. at 384. The Virginia Supreme Court had adopted the "significant relationship test" whereas the circuits in conflict with it had adopted the "loading and unloading" test. The Court clearly embraced the latter test, firmly rejecting more expansive interpretations of the Act.

Appellant also asserted in oral argument that there exists a "long and unbroken" line of decisions applying *Weyerhaeuser*. This assertion also is plainly wrong. The long line of decisions was broken following *Herb's Welding*. In the only Ninth Circuit decision construing Section 903(2) since *Herb's Welding*, this court clearly deferred to the Supreme Court's definition of maritime employment, thereby implicitly rejecting the *Weyerhaeuser* "significant relationship" test. *See Dorris v. Director, Office of Workers' Compensation Programs*, 808 F.2d 1362, 1364 (9th Cir. 1987).[8] Although there are only a few district and circuit court cases applying Section 903)2) since *Herb's Welding*, almost all rely on Supreme Court doctrine in lieu of previously established circuit law. *See Bailey v. Global Marine, Inc.*, 714 F.Supp. 235, 240, (S.D. Tex. 1989) (citing to *Herb's Welding* test as supplanting Fifth Circuit standards); *Clark v. Solomon Navigation, Ltd.*, 631 F.Supp. 1275, 1281-83 (S.D.N.Y. 1986) (applying

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[8] In *Dorris*, we denied coverage to a claimant whose "regular duties consisted of driving his truck onto the dock, where containers were placed on the vehicle's chassis, and driving to the consignee's delivery place. He also delivered containers from the consignee's delivery place to the harbor." *Dorris*, 808 F.2d at 1364. We held that such functions were not maritime, "when goods are unloaded from a ship and loaded aboard another *by other workers*." *Id.* at 1365 (emphasis added). Although we did not cite explicitly to *Herb's Welding* in *Dorris*, we relied on its precedents, such as *Northeast Marine* and *Pfeiffer*, for our emphasis on the test requiring involvement in loading and unloading of ships, and did not rely on *Weyerhaeuser* or its progeny.

Herb's Welding test in place in Second Circuit test),[9] *but see Sanders v. Alabama Dry Dock & Shipbuilding Co.*, F.2d 1085, 1088 (11th Cir. 1988)(applying a test similar to the Ninth Circuit's *Weyerhaeuser* test).[10]

Appellant contends that the cases continue to define the phrase "maritime employment" as a "general" and "catch-all" phrase. This is not so. The cases interpreting *Herb's Welding* have recognized the norrowness and specificity of the Supreme Court's test, and have "heed[ed] the signal of the Supreme Court" in accepting this more restrictive standard. *See, e.g., West v. Chevron U.S.A., Inc.*, 615 F. Supp. 377, 381 (E.D. La. 1985).[11]

We need not reach the question of whether Coloma might have met the standard articulated by the Ninth Circuit in *Weyerhaeu-*

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[9] The Second Circuit's standard was nearly identical to *Weyerhaeuser*. *See Fusco v. Perini N. River Assoc.*, 622 F.2d 1111, 1113 (2nd Cir 1980), *cert. denied*, 449 U.S. 1131 (1981).

[10] The Eleventh Circuit opinion in *Sanders* provides the lone exception among post-*Herb's Welding* cases to the general rule that Supreme Court doctrine interpreting Section 903(2) replaces circuit doctrine if the two are inconsistent. Yet, the Eleventh Circuit has fluctuated in its interpretation of Section 903(2). Although its only post-*Herb's Welding* case, *Sanders*, relies on a Fifth Circuit case, *Odom Constr. Co v. United States Dep't of Labor*, 622 F.2d 110, 113 (5th Cir. 1980), *cert. denied*, 450 U.S. 966 (1981), which articulates the "significant relationship" test, a pre-*Herb's Welding* Eleventh Circuit case, *Browning v. B.F. Diamond Constr. Co.* 676 F.2d 547, 549-50 (11th Cir. 1982),*cert. denied*, 459 U.S. 1170 (1983), relies on the "loading and unloading" test set forth by the Supreme Court in *Northeast Marine*. In deciding *Sanders*, the Eleventh Circuit therefore appears to have ignored not only Supreme Court doctrine, but also its own precedent. Thus, in light of this confusion as to precisely what the Eleventh Circuit standard is, we decline to accord precedential value to the *Sanders* decision.

[11] In *West*, the district court examined generally concepts of what is maritime, for purposes other than interpreting the LHWCA. The court referred to *Herb's Welding* as revealing that the Supreme Court has taken a "restrictive view" of what is maritime. 615 F. Supp. at 381. It concluded further that the Supreme Court views "expansive notions" of what is maritime "with disfavor." *Id.*

ser. To apply that test, as appellant urges us to do, would be to ignore the clear and direct mandate from the Supreme Court. Our duty of obedience to the Supreme Court is not conditioned on an explicit reversal by name of prior inconsistent Ninth Circuit authority.

[4] In the alternative, appellant urges that he is covered even if the *Herb's Welding* and *Chesapeake* standard is applied. He contends that his functions were "essential" to the longshoring operations of Chevron because the presence of the Seagull Inn permitted those crew members performing the loading and unloading duties to remain aboard the vessel during loading and unloading operations. That is not the case. The Seagull Inn closed in 1982, and Chevron has not been forced to shut down its operations. Those crew members apparently now use a cafeteria located about a mile away or are fed by messmen who remain aboard the tanker. Coloma's functions were not essential.

Finally, appellant contends that the *result* in *Chesapeake Ohio Ry. Co.* provides support for his claim. Specifically, he argues that the claimants in *Chesapeake Ohio Ry. Co.* were janitors whose occupational duties were no more essential to loading and unloading than those of a messman/cook. Appellant's argument misinterprets the facts of that case. Two of the claimants in *Chesapeake Ohio Ry. Co.* were responsible for cleaning spilled coal from rollers and conveyor belts that are part of the overall mechanical loading system at a location where coal is loaded from railway cars to a ship on navigable waters. 110 S. Ct. at 383. The third claimant maintained and repaired loading equipment. The Supreme Court held that:

> [E]mployees who are injured while maintaining or repairing equipment essential to the loading or unloading process are covered by the Act. Such employees are engaged in activity that is an integral part of and essential to those overall processes. . . . Someone who repairs or maintains a piece of loading equipment is just as vital to and an integral part of the loading process as the operator of the equipment.

> . . . The determinative consideration is that the ship loading process could not continue unless the [functions served by the claimants were performed].

Id. at 385-86.

This case is easily distinguishable. If the equipment repaired or maintained by the claimants in *Chesapeake Ohio Ry. Co.* stopped functioning adequately, the loading and unloading process could not continue. No such dependence exists in this case. After the Seagull Inn closed, Chevron's longshoring operation continued. Coloma's duties at the Seagull Inn simply were not essential to the loading and unloading process.

Therefore, we hold that, under the Supreme Court's binding interpretation of Section 903(2) of the 1972 Amendments, Coloma was not engaged in "maritime employment."

We affirm the August 12, 1988 decision of BRB and deny benefits under the LHWCA.

AFFIRM.

Appendix B

U.S. DEPARTMENT OF LABOR
Benefits Review Board
1111 20th St., N.W.
Washington, D.C. 20036

BRB Nos. 86-2084 and 86-2084A

CEFERINO COLOMA
Claimant-Petitioner

v.

CHEVRON SHIPPING COMPANY
Self-Insured Employer

ORDER

FILED AS PART OF THE RECORD OCT. 27, 1988

Linda M. Markies
Clerk of the Board
Benefit Review Board

Claimant moves for reconsideration of the Board's Decision and Order in *Coloma v. Chevron Shipping Co.*, BRB Nos. 86-2084 and 86-2084A (August 12, 1988), affirming the Decision and Order (85-LHCA-1981) of Administrative Law Judge Alexander Karst denying benefits based on his conclusion that claimant's employment as a messman/cook did not constitute maritime employment within the meaning of Section 2(3) of the Longshore and Harbor Workers' Compensation Act. 33 U.S.C. § 902(3). Claimant argues that the Board overlooked (1) the administrative law judge's express conclusion that "claimant's work was in aid of Chevron's seafaring and navigational activities"; and (2) United States Coast Guard regulation 46 C.F.R. § 35.35 which requires that "a sufficient number of the crew shall be on duty to perform cargo transfer operations."

Claimant first contends that his work as a messman at the Seagull Inn was directly linked to the loading and unloading of

ships based on the U.S. Coast Guard regulation providing that Chevron may give its tankermen shore leave as long as "a sufficient number of the crew shall be on duty to perform cargo transfer operations." 46 C.F.R. § 35.35-1(a). According to claimant, Chevron would not have been able to keep a sufficient number of the crew on duty to load and unload cargo for more than a few hours unless the crew was fed by the messmen at the Seagull Inn. Therefore, claimant argues that his work as a messman is directly linked to the loading and unloading process. We reject claimant's contention. The Supreme Court has clearly stated that workders who are on the situs but not engaged in the overall process of loading or unloading vessels are not covered under the Act. *Herb's Welding, Inc. v. Gray,* 470 U.S. 414, 105 S.Ct. 1421, 17 BRBS 78 (CRT) (1985); *Northeast Marine Terminal Co., Inc. v. Caputo,* 432 U.S. 249, 6 BRBS 150 (1977). In *Herb's Welding, supra,* the Supreme Court stated that employees who are not engaged in loading, unloading, repairing, or building a vessel are not covered simply because they are injured in an area adjoining navigable waters used for such activity. The Court further stated, "We have never read 'maritime employment' to extend so far beyond those actually involved in moving cargo between ship and land transportation." Thus, because claimant's work as a messman/cook was so far attenuated from employer's cargo transfer operations, he was not engaged in maritime employment for purposes of the Act.

Claimant next contends that the Board erred in concluding that claimant's work was not done in furtherance of traditional maritime activity because such a conclusion overlooks the administrative law judge's finding that "claimant's work was in aid of Chevron's seafaring and navigational activities." Decision and Order at 5. We reject this contention. The administrative law judge concluded that claimant's duties as a messman/cook were "neither inherently maritime nor significantly different from the tasks performed in dining halls, cafeterias and restaurants on land," and had no connection with loading, unloading, repairing or building vessels. In *Herb's Welding, supra,* the Supreme Court applied the same rationale and found that a welder on a fixed offshore drilling platform whose duties included building and maintaining platforms and pipelines was not a maritime employee

because those tasks are also performed on land, and their nature is not significantly altered by the maritime environment. Similarly, claimant's work as a messman at the Seagull Inn is not maritime employment under the Act.

Accordingly, claimant's Motion for Reconsideration is hereby denied.

/s/ ROY P. SMITH
Roy P. Smith, Acting Chief
Administrative Appeals Judge

/s/ JAMES F. BROWN
James F. Brown
Administrative Appeals Judge

/s/ NANCY S. DOLDER
Nancy S. Dolder
Administrative Appeals Judge

Dated this 27th day of
October 1988

Appendix C

U.S. DEPARTMENT OF LABOR

Benefits Review Board
1111 20th St., N.W.
Washington, D.C. 20036

BRB Nos. 86-2084 and 86-2084-A

CEFERINO COLOMA
Claimant-Petitioner
Cross-Respondent

v.

CHEVRON SHIPPING COMPANY
Self-Insured
Employer-Respondent
Cross-Petitioner

FILED AS PART OF THE RECORD
August 12, 1988

DECISION AND ORDER

Appeal of the Decision and Order and Order Denying Reconsideration of Alexander Karst, Administrative Law Judge, United States Department of Labor.

John R. Hillsman and Derek Jacobson (McGuinn, Hillsman & Palefsky), San Francisco, California, for the claimant.

Mark H. Tune (Harbinson, Carlson & Tune), San Francisco, California, for the self-insured employer.

Before: RAMSEY, Chief Administrative Appeals Judge, BROWN and DOLDER, Administrative Appeals Judge.

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order and Order Denying Reconsideration (85-LHCA-1981) of Administrative Law Judge Alexander Karst denying benefits on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 22 U.S.C. § 901 *et seq.* (the Act). In reviewing this appeal, the Board must

affirm the determinations of the administrative law judge which are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. § 921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). The Board heard oral argument on this case in San Francisco, California on July 15, 1988.

Claimant worked as a messman/cook for Chevron Shipping Company (employer) from 1974 until 1982. Claimant suffered from a cumulative occupational illness diagnosed as benign keratoma with lichnoid dermatitis on both hands, which arose out of his employment with Chevron due to repeated exposure to cleansing chemicals. The parties stipulated, and the administrative law judge agreed, that claimant was employed on a maritime situs; claimant's occupational illness has been permanent and untreatable since September 30, 1982; claimant's illness permanently disables him from his accustomed trade as a messman/cook; and claimant gave Chevron timely notice of his occupational injury in accordance with the provisions of 33 U.S.C. § 912. Employer provided medical treatment and paid state workers' compensation to claimant through the date of the hearing.

The administrative law judge found that the claim was filed within the two years statute of limitations set forth in the 1984 amended version of Section 13(b)(2), 33 U.S.C. § 913(b)(2) (Supp. IV 1986), and was, therefore, not time-barred. The administrative law judge concluded, however, that claimant was not a maritime "employee" as defined in Section 2(3), 33 U.S.C. § 902(3), and accordingly he denied benefits. On appeal, claimant contends that the administrative law judge erred in finding that claimant's employment as a messman/cook did not constitute maritime employment within the meaning of Section 2(3) of the Act. Employer responds, asserting that the administrative law judge's Decision and Order denying benefits should be affirmed. In addition, employer appeals the administrative law judge's finding that the instant claim is not timed-barred.

Claimant began working for Chevron as a messman/cook in September 1974. On January 23, 1975, claimant was assigned to the "Seagull Inn," the Chevron "crews' mess" on the Richmond Longwharf. Chevron's local port superintendent, Charles Adam,

testified that the primary function of the Seagull Inn was to provide meals to the officers and seamen of visiting Chevron tankers while their ship stewards took shore leave. The Seagull Inn also served the crews of Chevron's "Inland Fleet," the harbor tugs and barges ordinarily berthed at the Richmond Longwharf, along with occasional visitors such as Coast Guard officers, customs officials, harbor pilots, and outside contractors. Although these occasional visitors were charged for their meals, the seamen from Chevron's seagoing and inland fleets dined without charge in lieu of a meal alllowance. Moreover, since the Seagull Inn is located on the Longwharf itself, within the gates of the Richmond refinery, it was never open to the general public. Claimant and former Seagull Inn cook Miguel Presa testified that Chevron closed the Seagull Inn in June 1982 and transferred most of its employees to shipboard positions on tankers owned by Chevron's corporate affiliate, Chevron, U.S.A., Inc. or "CUSA." Claimant was transferred to the sea-going CUSA tanker, the *Hillyer Brown,* on July 14, 1982, but was discharged from the *Hillyer Brown* on July 27, 1982, and never returned to work thereafter.

The administrative law judge concluded that claimant is not covered under the Act because, (1) his duties as a messman/cook were "neither inherently maritime nor significantly different from the tasks performed in dining halls, cafeterias and restaurants on land," (2) claimant's employment had no connection with loading, unloading, repairing or building vessels, and (3) "because the Seagull Inn principally fed seamen and not longshoremen, claimant's work was in aid of Chevron's seafaring and navigational activities, and not in aid of any longshoring functions performed on the wharf." Decision and Order at 5.

Claimant argues on appeal that his activities as a galley hand in the crews' mess had a significant relationship to maritime transportation. Claimant argues that in applying the significant relationship test, the fact-finder must look to the purpose of the work, not solely to the particular skills used, and that the purpose of his work, feeding employer's seamen while their tankers discharged cargo at the wharf, served traditional maritime commerce.

In order to be covered under the Act as amended in 1972, claimant must satisfy the situs and status requirements.[1] *See P.C. Pfeiffer Co. v. Ford,* 444 U.S. 69, 100 S.Ct. 328, 11 BRBS 320 (1979). It is not disputed that claimant in the instant case meets the situs requirement. Thus, the issue is whether claimant's duties as a cook/messman meet the status requirement. The term "employee" is defined as any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and shipbreaker. . . ." 33 U.S.C. § 902(3). While claimant correctly asserts that maritime employment is not limited to the occupations specifically mentioned in Section 2(3), it cannot be read to eliminate any requirement of a connection with the loading or construction of ships. *Herb's Welding v. Gray,* 470 U.S. 414, 105 S.Ct. 1421, 17 BRBS 78 (CRT) (1985). The United States Supreme Court has stated that the purpose of the Act is to cover only those workers on the situs who are involved in the essential elements of loading and unloading. *Northeast Marine Terminal Co., Inc. v. Caputo,* 432 U.S. 249, 6 BRBS 150 (1977). The United States Court of Appeals for the Ninth Circuit, the circuit in which this case arises, looks to whether claimant's work involves a "realistically significant relationship to traditional maritime activity involving navigation and commerce on navigable waters." *Weyerhauser Co. v. Gilmore,* 528 F.2d 957, 3 BRBS 140 (9th Cir. 1975), *cert. denied,* 429 U.S. 868 (1976). *See also Schwabenland v. Sanger Boats,* 683 F.2d 309, 16 BRBS 78 (CRT) (9th Cir. 1982), *cert. denied,* 459 U.S. 1170 (1983).

We initially reject employer's argument at oral argument that claimant is not covered under Section 2(3) because his duties as a cook/messman are "typical support activities of a clerical

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[1] The 1984 Amendments to Section 2(3) do not apply here because claimant's injury occurred prior to September 28, 1984, the effective date of these provisions of the Longshore and Harbor Workers' Compensation Act Amendments of 1984. Pub L. No. 98-426, 98 Stat. 1639, 1655, § 28(c). We note, however, that the 1984 amended version of Section 2(3)(B), 33 U.S.C. § 902(3)(B)(Supp. IV 1986), excludes from coverage individuals employed by a restaurant.

personnel, payroll-type nature." OA Tr. at 18. The rationale that some jobs are not covered because they are support services incidental to any business operation has been rejected. *See, e.g., Miller v. Central Dispatch, Inc.*, 673 F.2d 773, 14 BRBS 752 (5th Cir. 1982), *rev'g* 23 BRBS 793 (1980); *Holcomb v. Robert W. Kirk & Assoc., Inc.*, 655 F.2d 589, 13 BRBS 839 (5th Cir. 1981), *rev'g* 11 BRBS 835 (1979); *Jackson v. Atlantic Container Corp.*, 15 BRBS 473 (1983).

We affirm, however, the administrative law judge's conclusion that claimant was not an "employee" under the Act because his work as a messman/cook did not involve the loading or unloading process and had no connection with the repairing or building of vessels. In *Herb's Welding, supra,* the Supreme Court held that a welder on a fixed offshore drilling platform was not a maritime employee because there is nothing inherently maritime about building and maintaining platforms and pipelines. The Court stated that those tasks are also performed on land, and their nature is not significantly altered by the maritime environment. 105 S.Ct. at 1428. Similarly, we hold that claimant's work at the Seagull Inn preparing and serving meals to the officers and seamen of Chevron tankers is not maritime employment under the Act since there is no connection with the loading and unloading of ships, and it is not done in furtherance of "traditional" maritime activity. *Herb's Welding, supra; Weyerhauser, supra.* We therefore hold that claimant is not an "employee" under Section 2(3) and is not covered by the Act. Because we affirm the administrative law judge's denial of coverage, we need not address employer's argument on cross-appeal.

Accordingly, the administrative law judge's Decision and Order and Order Denying Reconsideration are affirmed.

SO ORDERED.

ROBERT L. RAMSEY
Robert L. Ramsey, Chief
Administrative Appeals Judge

JAMES F. BROWN
James F. Brown
Administrative Appeals Judge

NANCY S. DOLDER
Nancy S. Dolder
Administrative Appeals Judge

Appendix D

U.S. DEPARTMENT OF LABOR
Office of Administrative Law Judges
211 Main Street
San Francisco, California 94105
Suite 600

Case No. 85-LHC-1981
OWCP No. 13-76186

In the Matter of
CEFERINO COLOMA,
Claimant,
v.
CHEVRON SHIPPING COMPANY,
Self-Insured Employer.

ORDER DENYING RECONSIDERATION

Claimant's Motion for Reconsideration, which was orally argued on July 11, 1986, is denied.

The summary of claimant's argument made at the hearing of the motion, contained in Mr. Hillsman letter of July 2, 1986, and Mr. Tune's reply of July 8, 1986, are hereby made a part of the record herein.

/s/ ALEXANDER KARST
Alexander Karst
Administrative Law Judge

Dated: July 18, 1986
San Francisco, California
AK:brt

Appendix E

U.S. DEPARTMENT OF LABOR
Office of Administrative Law Judges
211 Main Street
San Francisco, California 94105
Suite 600

Case No. 85-LHC-1981
OWCP No. 13-76186

In the Matter of
CEFERINO COLOMA
Claimant

v.

CHEVRON SHIPPING COMPANY
Self-insured Employer

John R. Hillsman, Esq.
McGuinn, Hillsman & Palefsky
451 Jackson Street
San Francisco, California 94111
For the Claimant

Mark H. Tune, Esq.
Harbinson, Carlson & Tune
114 Sansome Street, Suite 618
San Francisco, California 94104
For the Respondent

Before: ALEXANDER KARST
Administrative Law Judge

DECISION AND ORDER DENYING BENEFITS

Ceferino Coloma, claimant herein, seeks benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 *et seq.*, (the "Act"), for permanent disability due to an injury to his hands sustained in the course of his employment by respondent Chevron Shipping Company during the period 1974 to 1982. The parties have stipulated, and I accept that claimant

Ceferino Coloma (hereinafter "Coloma") was employed as a messman/cook by respondent Chevron Shipping Co. (hereinafter "Chevron") from 1974 until 1982; that claimant suffered cumulative, occupational illness diagnosed as benign keratoma with lichnoid dermatititis on both hands; that claimant's occupational illness arose out of and in the course of his employment with Chevron due to his repeated exposure to the harmfulstimuli of cleansing chemicals; that Chevron was the "last employer" to expose claimant to said stimuli; that Chevron exposed claimant to said stimuli on a "maritime situs"; that claimant's occupational illness has been permanent, stationary, and untreatable since September 30, 1982; that said injury permanently disables claimant from his accustomed trade as a messman/cook; that claimant's applicable average weekly wage was $394.09; and that claimant gave Chevron timely notice of his occupational injury in accordance with the provisions of Section 12 of the Act. It was further agreed that Chevron received timely notice of injury, and that medical treatment and workers' compensation under state law were provided to claimant by respondent through the date of the hearing.

The issues presented for adjudication are timeliness under Section 13(b)(2), jurisdiction (status) under Section 2(3) of the Act, nature and extent of disability under Section 8, and penalties, interest, and attorney's fees under Section 10, 14, and 28.

This claim was filed on June 20, 1984. A medical chart entry dated June 6, 1978 said that "Mr. Coloma is questioning his sick time hand condition should be industrially related as it may be caused by the detergents". (Resp. Exh. V). Claimant testified that in 1978 his hands hurt at work when his hands were wet and when he washed dishes, and that he was told in 1978 to wear gloves in order to not get his hands wet. (Tr. pp. 69-71).

The factual question is whether the claim was filed within the two-year statute of limitations set forth in the 1984 Amendments to Section 13(b)(2). The legal question concerning the 1984 Amendments to the Act, is whether those Amendments apply. Given the record in this case, I need not consider either issue. There is a question as to the exact date on which claimant should have first become aware, in the exercise of reasonable diligence or

by reason of medical advice, of the relationship between his employment and the occupational illness. Pointing to the fact that claimant had suffered from the condition for quite a long time, Chevron argues that he should have apprehended its industrial etiology earlier than June 20, 1981, i.e., as early as 1978. Claimant denies this. He explained that he was not told what was causing his hand problems until July 28, 1982, when Dr. Daquioag first informed him that his illness related to chemical exposure at work. I find this testimony credible and convincing. Though medical records indicate that the claimant received treatment for this condition before June 20, 1982, I find that there is nothing to suggest that he could or should have understood its relation to his work before July 28, 1982.

More importantly, I find that Chevron was fully aware of claimant's occupational illness. Chevron had been paying Mr. Coloma's state workers' compensation benefits prior to the hearing. In this connection, I note Chevron's stipulation that it received timely notice of Coloma's claim under Section 12. Like the Benefits Review Board in *Saylor v. Ingalls Shipbuilding, Inc.*, 9 BRBS 561, I therefore conclude that:

> "... the employer was fully aware of claimant's injured condition since the employer was at all times prior to the hearing paying the claimant compensation pursuant to the state workers' compensation law. Clearly, the purpose behind the statute of limitations would not be served by a barring of the claimant's claim." 9 BRBS at 563.

This claim is not barred by the statute of limitations.

The principal question presented here concerns claimant's status as a "maritime employee" under Section 2(3) of the Act. Chevron admits that it is a "maritime employer" under Section 2(4), so we can focus our inquiry on the injured worker. The issue of whether an injured worker should be deemed a "maritime employee" is a question of fact. *South Chicago Coal & Dock v. Bassett* (1940) 309 U.S. 251, 158.

Claimant is a 56-year-old former messman/cook. He served 20 years in that capacity with the U. S. Navy and five more with Chevron. Between 1977 and 1982, he worked in the "Seagull

Inn", the Chevron "crews mess" on the Richmond Longwharf. Undisputed testimony from Chevron's local Port Superintendent, Charles Adam, establishes that the primary function of the Seagull Inn was to provide meals to the officers and seamen of visiting Chevron tankers while their shipboard stewards took shore leave. The Seagull Inn also served the crews of Chevron's "Inland Fleet", the harbor tugs and barges ordinarily berthed at the Richmond Longwharf, together with occasional visitors like Coast Guard officers, customs officials, harbor pilots, and outside contractors. Though these later, occasional visitors were charged for their meals, the seamen from Chevron's seagoing and inland fleets dined for free "in lieu of a meal allowance". Moreover, since the Seagull Inn is located on the Longwharf itself, within the gates of the Richmond refinery, it was never open to the general public.

Undisputed testimony from the claimant and former Seagull Inn cook Miguel Presa establishes that Chevron closed the Inn in 1982, but transferred most of its employees to shipboard positions on tankers owned by respondent's corporate affiliate, Chevron, U.S.A., Inc., or "CUSA". Claimant himself was transferred to the sea-going CUSA tanker HILYER BROWN on July 14, 1982. Adam, Presa, and claimant all agree that, whether he worked ashore at the "Seagull Inn" or afloat on a CUSA tanker, claimant's duties were always the same, preparing and serving meals to hungry seamen.

Pointing to the fact that he was injured ashore, and relying on *Herb's Welding, Inc., v. Gray* (1985) ___ U.S. ___, 105 S. Ct. 1421, Chevron argues that there was nothing "inherently maritime" about Coloma's work as a messman/cook. According to the respondent, claimant was not "engaged in the overall process of loading or unloading", and therefore cannot be deemed a "maritive employee". Claimant contends that *Herb's Welding, Inc., v. Gray, supra*, is distinguishable and this does not control the result of this case. He relies on older case law and asserts that he is a "maritime employee" because his work had a "realistically significant relationship to national maritime activity."

Parties agree that the 1984 amendment of § 902(3) which excludes restaurant workers does not apply here because this case

was filed prior to the effective date of the amendment of the section.

In *Herb's Welding, Inc., v. Gray, supra*, the Supreme Court held that a welder who worked on an offshore platform was not engaged in maritime employment under the coverage of the Act. The Court stated that there was "nothing inherently maritime" about his tasks which "are also performed on land, and their nature is not significantly altered by the maritime environment" (*Id.*, 105 S.Ct., at p. 1478, 14 BRBS, at p. 83 (CRT)).

> "But Congress did not seek to cover all those who breathe salt air. Its purpose was to cover those workers on the situs who are involved in the essential elements of loading and unloading; it is 'clear that persons who are on the situs but not engaged in the overall process of loading or unloading vessels are not covered." *Northeast Marine Terminal Co. v. Caputo*, 432 U.S., at 267, 97 S.Ct., at 2359. While 'maritime employment' is not limited to the occupations specifically mentioned in § 2(3), [footnote omitted] neither can it be read to eliminate any requirement of a connection with the loading or construction of ships. As we have said, the 'maritime employment' requirement is 'an occupational test that focuses on loading and unloading.' *P. C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 80, 100 S.Ct. 328, 336, 62 L.Ed.2d 225 (1979). The Amendments were not meant 'to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity.' H.R.Rep. No. 92-1441, p. 11 (1972); S.Rep.No. 92-1125, p. 13 (1972), U.S.Code Cong. & Admin., News 1972, p. 4708. We have never read 'maritime employment' to extend so far beyond those actually involved in moving cargo between ship and land transportation. Both *Caputo*, and *P. C. Pfeiffer Co.* make this clear . . ." (*Id.*, 105 S.Ct., at pp. 1427-1428, 17 BRBS, at pp. 82-83 (CRT).

Claimant's tasks of cleaning tables, washing dishes and cooking were neither "inherently maritime" nor were they significantly different from the tasks that are performed in dining halls, cafeterias and restaurants on land. Indeed, claimant testified that,

after he left employment as a messman, he looked for a job at a restaurant since it was the only thing he knew. (Tr. p. 75). The evidence does not establish that claimant's employment involved any aspect of the process of loading, unloading, repairing or building vessels. *Because the "Seagull Inn" principally fed seamen and not longshoremen, claimants work was in aid of Chevron's seafaring and navigational activities, and not in aid of any longshoring functions performed on the wharf.*

Under the rationale of *Herb's Welding, Inc., v. Grady, supra*, I feel compelled to find that because claimant's occupation had no connection with loading or unloading of ships, moving cargo between ships and land transportation, or ships construction or repair, he was not covered by the Act.

The claim is denied.

/s/ ALEXANDER KARST
Alexander Karst
Adminsitrative Law Judge

Dated: May 21, 1986
San Francisco, California

AK:es

Appendix F

Longshoremen's and Harbor Workers' Compensation Act As Amended, 1972

An Act To provide compensation for disability or death resulting from injury to employees in certain maritime employment, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

SEC. 1. This Act may be cited as "Longshoremen's and Harbor Workers' Compensation Act."

DEFINITIONS

SEC. 2. When used in this Act —

(1) The term "person" means individual, partnership, corporation, or association.

(2) The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.

(3) The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

(4) The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including

any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

(5) The term "carrier" means any person or fund authorized under section 32 to insure this Act and includes self-insurers.

(6) The term "Secretary" means the Secretary of Labor.

(7) The term "deputy commissioner" means the deputy commissioner having jurisdiction in respect of an injury or death.

(8) The term "State" includes a Territory and the District of Columbia.

Appendix G

Public Law 98-426
98th Congress

An Act

Entitled the "Longshore and Harbor Workers' Compensation Act Amendments of 1984".

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) this Act may be cited as the "Longshore and Harbor Workers' Compensation Act Amendments of 1984".

(b) Except as otherwise specifically provided, whenever in this Act an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of the Longshoremen's and Harbor Workers' Compensation Act.

DEFINITIONS

SEC. 2.(a) Section 2(3) is amended to read as follows:

"(3) The term 'employee' means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker, but such term does not include —

"(A) individuals employed exclusively to perform office clerical, secretarial, security, or data processing work;

"(B) individuals employed by a club, camp, recreational operation, restaurant, museum, or retail outlet;

"(C) individuals employed by a marina and who are not engaged in construction, replacement, or expansion of such marina (except for routine maintenance);

"(D) individuals who (i) are employed by suppliers, transporters, or vendors, (ii) are temporarily doing business

on the premises of an employer described in paragraph (4), and (iii) are not engaged in work normally performed by employees of that employer under this Act;

"(E) aquaculture workers;

"(F) individuals employed to build, repair, or dismantle any recreational vessel under sixty-five feet in length;

"(G) a master or member of a crew of any vessel; or

"(H) any person engaged by a master to load or unload or repair any small vessel under eighteen tons net;

if individuals described in clauses (A) through (F) are subject to coverage under a State workers' compensation law."

(b) Section 2(10) is amended by inserting before the period at the end thereof the following: "; but such term shall mean permanent impairment, determined (to the extent covered thereby) under the guides to the evaluation of permanent impairment promulgated and modified from time to time by the American Medical Association, in the case of an individual whose claim is described in section 10(d)(2)".

(c) Section 2(13) is amended to read as follows:

Supreme Court, U.S.
FILED
JUN 27 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1894

In The

Supreme Court of the United States

OCTOBER TERM, 1989

CEFERINO COLOMA,

Petitioner,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS AND CHEVRON SHIPPING COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT CHEVRON SHIPPING COMPANY IN OPPOSITION

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QUESTION PRESENTED

Whether a person employed as a cook and messman serving crews of ships and other persons at a mess hall on a wharf, but who had no involvement with the loading and unloading of vessels, or the construction or repair of vessels, was engaged in "maritime employment" within the meaning of section 2(3) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 902(3) (1982 ed., and Supp. V).

RULE 29.1 LISTING

Respondent Chevron Shipping Company has a parent company, Chevron Corporation. Respondent Chevron Shipping Company has no subsidiaries.

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No. 89-1894

In The

Supreme Court of the United States

October Term, 1989

Ceferino Coloma,

Petitioner,

v.

Director, Office Of Workers' Compensation Programs and Chevron Shipping Company,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT CHEVRON SHIPPING COMPANY IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. A1-A14) is reported at 897 F.2d 394. The order of the Benefits Review Board denying reconsideration (Pet. App. A15-A17) is reported at 21 Ben.Rev.Bd.Serv. (MB) 318. The initial decision and order of the Benefits Review Board (Pet. App. A18-A23) is reported at 21 Ben.Rev.Bd.Serv. (MB) 200. The order denying reconsideration by the administrative law judge (Pet. App. A24) is not reported.

The administrative law judge's decision and order denying benefits (Pet. App. A25-A30) is reported at 18 Ben.Rev.Bd.Serv. (MB) 434 (ALJ).

JURISDICTION

The judgment of the Court of Appeals was entered on February 23, 1990. The petition for a writ of certiorari was filed on April 25, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

1. Petitioner, Ceferino Coloma, was employed by respondent, Chevron Shipping Company (Chevron Shipping), as a messman and cook at a mess hall operated by Chevron Shipping on a wharf. The primary function of the mess hall, known as the "Seagull Inn", was to provide meals to the officers and seamen of visiting tankers while their shipboard stewards took shore leave. Pet. App. A28. The Seagull Inn also served crews of Chevron harbor tugs and barges, and other visitors, including Coast Guard officers, customs officials, harbor pilots and outside contractors. *Id.* Coloma's work at the Seagull Inn involved cleaning tables, washing dishes and cooking. Pet. App. A29. Coloma's employment did not involve any aspect of the process of loading, unloading, repairing or building vessels. Pet. App. A30.

2. Respondent Chevron Shipping notes that petitioner's statement of facts (Pet. 5-6) includes factual assertions that are not material herein or that are not

supported in the record, as follows: (1) Coloma's employments by another employer, Chevron U.S.A. Inc., aboard vessels before and after his employment by respondent Chevron Shipping are not material to this case; (2) The record does not establish that the operation of a mess hall on the wharf for seamen to eat while off a vessel was necessitated by a Coast Guard regulation requiring members of the crew to remain aboard the vessel during cargo handling. After the Seagull Inn was closed in 1982, the crews ate aboard ship or at a cafeteria located about a mile away. Pet. App. A13.

3. Coloma filed a claim under the Longshore and Harbor Workers' Compensation Act (LHWCA or Act), 33 U.S.C. §§ 901-950 (1982 ed., and Supp. V) for benefits on account of an injury sustained in the course of his employment during the years 1974 to 1982. Pet. App. A25-A26. Chevron Shipping disputed the claim. *Id.* At a formal hearing before Administrative Law Judge (ALJ) Karst, the parties stipulated that the claimed injury, benign keratoma and lichnoid dermatitis of both hands, arose out of and in the course of Coloma's employment with Chevron Shipping and that the injury occurred on a "maritime situs". *Id.* The ALJ determined that Coloma was not entitled to LHWCA benefits, finding that he was not a "maritime employee" within the meaning of section 2(3) of the Act, 33 U.S.C. 902(3), because his occupation "had no connection with loading or unloading of ships, moving cargo between ships and land transportation, or ships construction or repair." Pet. App. A30. Coloma's motion for reconsideration was denied. Pet. App. A24.

4. Coloma appealed to the Benefits Review Board pursuant to 33 U.S.C. § 921(b), arguing that his work had

a significant relationship to maritime transportation and that the ALJ relied on dicta in this Court's decision in *Herb's Welding, Inc. v. Gray*, 470 U.S. 414 (1985). The Board affirmed the ALJ's decision and order and order denying reconsideration. Pet. App. A18. The Board concluded that Coloma was not engaged in maritime employment because his work had no connection with the loading and unloading of ships and his work was not done in furtherance of traditional maritime activity. Pet. App. A22. Coloma moved for reconsideration and the Board denied the motion. Pet. App. A15.

5. Coloma appealed to the Court of Appeals pursuant to 33 U.S.C. § 921(c). The Court of Appeals affirmed the decision of the Board. Pet. App. A1. The Court of Appeals concluded that Coloma had not been engaged in "maritime employment", that the definition of maritime employment applied in *Herb's Welding* was not dicta and that Coloma's functions were not essential to the longshoring operations of Chevron Shipping. Pet. App. A1.

SUMMARY OF ARGUMENT

The Court of Appeals correctly applied the standard articulated by this Court in *Herb's Welding, Inc. v. Gray*, 470 U.S. 414 (1985) and *Chesapeake And Ohio Ry. Co. v. Schwalb*, 110 S.Ct. 381 (1989). Petitioner's employment did not involve any aspect of the process of loading, unloading, building or repairing vessels. Thus, it was correctly determined that he was not "engaged in maritime employment" within the meaning of section 2(3) of the LHWCA, 33 U.S.C. § 902(3).

The "realistically significant relationship to traditional maritime employment" test, which petitioner contends should have been applied to determine whether he was engaged in maritime employment under section 2(3), was rejected by this Court in its decisions in *Herb's Welding* and *Chesapeake And Ohio Ry. Co.* The decision below does not create any real conflict with the decision of another court of appeals.

Accordingly, this case does not warrant further review.

ARGUMENT

A PERSON EMPLOYED AS A MESSMAN AND COOK AT A MESS HALL LOCATED ON A WHARF AND WHO HAS NO INVOLVEMENT IN THE LOADING, UNLOADING, BUILDING OR REPAIR OF VESSELS IS NOT COVERED UNDER THE LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT.

The Court of Appeals correctly concluded that petitioner Coloma, a messman and cook, who was injured while employed at a mess hall located on a wharf but who had no involvement with the loading, unloading, building or repair of vessels, was not covered by the LHWCA. In order for the LHWCA to apply to Coloma, he must be a "person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include ___" (certain enumerated categories of employees). 33 U.S.C. § 902(3)(1982 ed., and Supp. V). In *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 424 (1985), this Court stated that "the 'maritime employment'

requirement is 'an occupational test that focuses on loading and unloading.' " (quoting its decision in *P. C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 80 (1979)). "Its [Congress'] purpose was to cover those workers on the situs who are involved in the essential elements of loading and unloading. . . . " *Id.*, at 423. "[L]and-based activity occurring within the § 903 situs will be deemed maritime only if it is an integral or essential part of loading or unloading a vessel." *Chesapeake And Ohio Ry. Co. v. Schwalb*, 110 S.Ct. 381, 384 (1989). Since it was found that Coloma's duties of cleaning tables, washing dishes and cooking did not involve "any aspect of the process of loading, unloading, repairing or building vessels" (Pet. App. A30), it was correctly concluded that Coloma was not engaged in maritime employment.

THE COURT OF APPEALS' DECISION IN ACCORDANCE WITH THIS COURT'S DECISION IN *HERB'S WELDING*, IN WHICH THE "REALISTICALLY SIGNIFICANT RELATIONSHIP" TEST FOR DETERMINING MARITIME EMPLOYMENT WAS REJECTED, DOES NOT PROVIDE A REASON FOR REVIEW BY THIS COURT.

Petitioner argues (Pet. 7-14) that this Court should consider whether the "realistically significant relationship" test articulated in *Weyerhaeuser Company v. Gilmore*, 528 F.2d 957 (9th Cir. 1975), cert. denied, 429 U.S. 868 (1976) should be applied to determine whether a person is engaged in maritime employment. In *Weyerhaeuser*, the Court of Appeals for the Ninth Circuit held that the occupational test under section 902(3) requires that the employee's job "have a realistically significant relationship to 'traditional maritime activity. . . . ' " *Id.*, at 961

(citation omitted). This Court rejected that test in its decisions in *Herb's Welding, Inc. v. Gray*, 470 U.S. 414 (1985) and *Chesapeake And Ohio Ry. Co. v. Schwalb*, 110 S.Ct. 381 (1989). In *Herb's Welding*, the Court of Appeals for the Fifth Circuit had held that the employee's work bore "a realistically significant relationship to traditional maritime activity involving navigation and commerce on navigable waters." *Herb's Welding v. Gray*, 703 F.2d 176, 179-180 (5th Cir. 1983). This Court reversed, rejecting the "Fifth Circuit's expansive view of maritime employment." *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 423 (1985). In *Chesapeake And Ohio Ry. Co. v. Schwalb*, 110 S.Ct. 381 (1989), this Court reversed the Supreme Court of Virginia which had adopted the "realistically significant relationship" test. "In the course of considerable litigation, including several cases in this Court, it has been clearly decided that, aside from the specified occupations, land-based activity occurring within the § 903 situs will be deemed maritime only if it is an integral or essential part of loading or unloading a vessel." *Id.*, at 384.

Petitioner's reliance (Pet. 4, 8, 11, 12) on *Executive Jet Aviation v. City of Cleveland*, 409 U.S. 249 (1972) in support of the "realistically significant relationship" test employed in *Weyerhaeuser Company v. Gilmore*, 528 F.2d 957 (9th Cir. 1975), cert. denied, 429 U.S. 868 (1976) is inapposite. In *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 320 n. 29 (1983), this Court noted that *Executive Jet*, which involved the application of federal admiralty tort jurisdiction to an airplane crash into navigable waters, was not relevant to determination of LHWCA coverage.

The decisions of the Courts of Appeals for the Eleventh and Fifth Circuits, to which petitioner refers (Pet. 8-9), are not in conflict with the decision below. In *Sanders v. Alabama Dry Dock And Shipbuilding Co.*, 841 F.2d 1085, 1088 (11th Cir. 1988), the Court of Appeals for the Eleventh Circuit relied on *Odom Const. Co. v. U. S. Dept. of Labor*, 622 F.2d 110, 113 (5th Cir. 1980), a pre-*Herb's Welding* decision, in applying the "realistically significant relationship" test. The Eleventh Circuit's reliance on pre-*Herb's Welding* authority without reference to this Court's decision in *Herb's Welding* does not represent a clear conflict with the Ninth Circuit's decision below. The Fifth Circuit's decision in *Union Texas Petroleum v. PLT Engineering*, 895 F.2d 1043 (5th Cir. 1990), which involved a choice of contract law question under the Outer Continental Shelf Lands Act, 67 Stat. 462, 43 U.S.C. §§ 1331-56 (1986 ed., and Supp. III 1989), is not in conflict with the decision below because petitioner's reference is to dictum and in its opinion, the Fifth Circuit acknowledged this Court's criticism of the Fifth Circuit's "expansive view of maritime employment." *Id.*, at 1049.

Petitioner contends (Pet. 12-14) that the standard applied in *Herb's Welding* limits maritime employment to "four narrow categories", and that it is in conflict with this Court's statement in *P. C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 77-78 n. 7 (1979) indicating that the occupations included within the meaning of "maritime employment" are not limited to those mentioned in § 902(3). The decisions are not in conflict. It was acknowledged in *Herb's Welding* and *Chesapeake And Ohio Ry. Co.* that the listed occupations were not exclusive. *Herb's Welding, Inc. v.*

Gray, 470 U.S. 414, 423 n. 9 (1985), *Chesapeake And Ohio Ry. Co. v. Schwalb*, 110 S.Ct. 381, 384 (1989).

In urging this Court to abandon its prior decisions and adopt a view of "maritime employment" which would include activity that is not an integral or essential part of loading or unloading a vessel, petitioner disregards this Court's observation that "Congress did not seek to cover all those who breathe salt air." *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 423 (1985).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1990

No. 89-1894

Supreme Court, U.S.
FILED
AUG 27 1990
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

CEFERINO COLOMA, PETITIONER

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS AND CHEVRON SHIPPING COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Petitioner suffered work-related injury while employed as a cook and messman in a "crews' mess" located on a wharf. The question presented is whether the court of appeals was correct in holding that petitioner did not meet the "status" requirement for coverage under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 902(3).

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The opinion of the court of appeals (Pet. App. A1-A14) is reported at 897 F.2d 394. The order of the Benefits Review Board denying reconsideration (Pet. App. A15-A17) is reported at 21 Ben. Rev. Bd. Serv. (MB) 318; the Board's original decision and order (Pet. App. A18-A23) is reported at 21 Ben. Rev. Bd. Serv. (MB) 200. The decision of the administrative law judge (Pet. App. A25-A30) is reported at 18 Ben. Rev. Bd. Serv. (MB) 434 (ALJ).

JURISDICTION

The judgment of the court of appeals was entered on February 23, 1990. The petition for a writ of

certiorari was filed on April 25, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was employed by respondent Chevron Shipping Company as a messman and cook. Pet. App. A3. From 1977 to 1982, he worked at the "Seagull Inn," the Chevron "crews' mess" on the Richmond Longwharf near San Francisco. The "primary function" of the Inn "was to provide meals to the officers and seamen of visiting Chevron tankers while their shipboard stewards took shore leave." Pet. App. A4; Pet. 5. In 1982, Chevron closed the Inn and began feeding its crew members either at a cafeteria about a mile away or by using messmen who remained aboard the tankers. Pet. App. A5, A13. About that time, petitioner was diagnosed as suffering from an occupational disease, benign keratoma with lichenoid dermatitis on both hands, caused by repeated exposure to harsh cleansing agents in the course of his employment with Chevron. Pet. App. A3-A4. The parties stipulated that the injury arose on a "maritime situs" as defined by the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 903(a), and resulted in permanent disability. Pet. App. A4. The only dispute is whether petitioner's work also met the Act's "status" test for coverage, *i.e.*, whether it constituted "maritime employment" as defined in 33 U.S.C. 902(3).[1]

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[1] Since petitioner's injury arose on July 28, 1982, his claim is governed by the 1972 version of the LHWCA, rather than the Act as amended in 1984. See Pet. App. A4 n.1. The 1972 version of Section 2(3), Longshoremen's and Harbor Work-

2. After a hearing, an administrative law judge denied benefits on the ground that petitioner was not engaged in "maritime employment." Pet. App. A25-A30. The ALJ found that petitioner's tasks of cleaning tables, washing dishes, and cooking were neither "inherently maritime" nor "significantly different" from the tasks performed at any land-based restaurant. Pet. App. A29. Relying on *Herb's Welding, Inc.* v. *Gray*, 470 U.S. 414 (1985), he further found that petitioner's employment did not involve "any aspect of the process of loading, unloading, repairing or building vessels" and had "no connection with loading or unloading of ships, moving cargo between ships and land transportation, or ships [*sic*] construction or repair." Pet. App. A30.

3. The Benefits Review Board affirmed. Pet. App. A18-A23. It noted that while maritime employment is not limited to the occupations specifically listed in Section 2(3) of the LHWCA, 33 U.S.C. 902(3), some connection with the loading or construction of ships is required under this Court's interpretation of Section 2(3) in *Herb's Welding*. The Board held that petitioner's work as a cook had no such connection. Pet. App. A21-A22. The Board then applied an earlier test employed by the Ninth Circuit in *Weyerhaeuser Co.* v. *Gilmore*, 528 F.2d 957, 961 (1975),

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ers' Compensation Act Amendments of 1972, Pub. L. No. 92-576, § 2(a), 86 Stat. 1251, provided that:

> The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

cert. denied, 429 U.S. 868 (1976), under which claimants satisfy the requirement of Section 2(3) if their work has a "realistically significant relationship to 'traditional maritime activity involving navigation and commerce on navigable waters.'" Pet. App. A21-A22 (citation omitted). Under this test, the Board found that petitioner's work was "not done in furtherance of 'traditional' maritime activity" and thus was not covered employment. Pet. App. A22.

On reconsideration, the Board rejected petitioner's contention that his work was directly linked to loading and unloading because the Seagull Inn served tanker workers who loaded and unloaded cargo. The Board ruled instead that "claimant's work as a messman/cook was so far attenuated from employer's cargo transfer operations * * * [that] he was not engaged in maritime employment for purposes of the Act." Pet. App. A16.

4. The court of appeals affirmed. Pet. App. A1-A14. It determined that this Court definitively stated the applicable status test in *Herb's Welding* and *Chesapeake & O. Ry.* v. *Schwalb*, 110 S. Ct. 381 (1989), as one that dictated coverage for those whose work involved "the essential elements of loading and unloading." Pet. App. A8-A10. The appellate court noted in addition that this Court has rejected *Weyerhaeuser*'s "significant relationship" test by reversing lower court decisions applying *Weyerhaeuser*. Pet. App. A10-A12. The court thus described as "plainly wrong" petitioner's assertion that a "long and unbroken" line of decisions had applied the *Weyerhaeuser* test, concluding instead that the "line * * * was broken following *Herb's Welding*," even in the circuit that had produced *Weyerhaeuser*. Pet. App. A11-A12 (citing *Dorris* v. *Director, OWCP*, 808

F.2d 1362 (9th Cir. 1987)).[2] Accordingly, the court below did not reach the question whether petitioner could meet the *Weyerhaeuser* standard, since to apply that test "would be to ignore the clear and direct mandate from the Supreme Court." Pet. App. A12-A13.

The court of appeals then applied the standard articulated in *Herb's Welding* and *Schwalb*. Pet. App. A13-A14. It held that petitioner's functions as a messman and cook were not "essential" to Chevron's loading and unloading of oil tankers, particularly because those operations have continued and crew members have eaten elsewhere after the Seagull Inn closed in 1982. Pet. App. A13. The court distinguished the functions of the employees in this case from those of the employees in *Schwalb*, finding that the covered maintenance and repair workers in *Schwalb* were an "integral part of the loading process" without which that process "could not continue," while "[n]o such dependence exists in this case." Pet. App. A13-A14. The court therefore concluded that petitioner was not engaged in "maritime employment" under Section 2(3) of the Longshore Act.

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[2] The court noted that the decision in *Sanders* v. *Alabama Dry Dock & Shipbuilding Co.*, 841 F.2d 1085 (11th Cir. 1988), is "the lone exception among post-*Herb's Welding* cases to the general rule that Supreme Court doctrine interpreting Section 903(2) replaces circuit doctrine if the two are inconsistent." The court added that the Eleventh Circuit itself has "fluctuated in its interpretation of Section 902(3)." Pet. App. A12 n.10. As we explain below (pp. 10-11, *infra*), the Eleventh Circuit has since made clear that it applies the status test adopted by this Court.

ARGUMENT

The decision of the court of appeals applies settled legal standards to the particular facts of this case, and its conclusion does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore unwarranted.

1. As amended in 1972, the LHWCA provides workers' compensation benefits to employees of maritime employers who meet both "situs" and "status" requirements. Workers must, first, be injured on a covered "situs," defined under the Act as "navigable waters * * * including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel." Section 3(a), 33 U.S.C. 903(a) (1982). In order to meet the "status" requirement as well, employees must be "engaged in maritime employment," which the Act defines as "including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and shipbreaker." Section 2(3), 33 U.S.C. 902(3) (1982); see *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 263-264 (1977).

Petitioner contends (Pet. 9-14) that this Court's opinions do not make clear how the "status" requirement of Section 2(3) should be interpreted. The contention is without merit. This Court has stipulated, first, that maritime employment "expressly includes the specified occupations but obviously is not limited to those callings." *Schwalb*, 110 S. Ct. at 384. The Court has in turn defined which land-based workers other than those in the specified occupations are in fact covered. Recognizing that Congress added the "status" requirement to avoid automatic coverage

of all employees injured on the maritime situs (see, *e.g.*, *Herb's Welding*, 470 U.S. at 423), the Court has adopted a functional approach that ties construction of the term "maritime employment" closely to the roles performed by employees in the occupations upon which the Act "focuses primarily"—longshoreman, harborworker, ship repairman, shipbuilder, and shipbreaker. *Northeast Marine Terminal Co.*, 432 U.S. at 273. As the Court has stated, "[t]he Amendments were not meant 'to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity.'" *Herb's Welding*, 470 U.S. at 424. Rather, the Act covers all workers involved in "some portion" of the "overall process of loading and unloading vessels" (*P.C. Pfeiffer Co.* v. *Ford*, 444 U.S. 69, 82-83 (1979); *Northeast Marine Terminal*, 432 U.S. at 267), whether the worker is checking and marking goods, as in *Northeast Marine Terminal Co.*, moving cargo, as in *P. C. Pfeiffer Co.*, or cleaning or repairing loading equipment, as in *Schwalb*. Recently this Court summarized its prior decisions as having "clearly decided that, aside from the specified occupations [in Section 2(3)], land-based activity occurring within the § 903 situs will be deemed maritime only if it is an integral or essential part of loading or unloading a vessel." *Schwalb*, 110 S. Ct. at 384; see also *Herb's Welding*, 470 U.S. at 424.[3]

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[3] This Court has yet to entertain a case in which a worker, while not a "ship repairman, shipbuilder, [or] shipbreaker," has claimed to be a harborworker performing work that is "an integral or essential part" of ship repair, shipbuilding, or shipbreaking. That question is not presented here, and when it is, we assume the Court would apply an "integral or essential part" test analogous to that it has decreed appropriate for the cases of workers who claim to be aiding the

As consistently as this Court has propounded its functional, "essential part" test, it has rejected the results reached by courts applying the less-focused "significant relationship" standard proposed by petitioner. That standard was adopted by the Ninth Circuit, interpreting the 1972 Act's "status" requirement in a decision rendered before the first of this Court's cases construing that requirement. Lacking guidance from this Court, the Ninth Circuit announced that coverage under the LHWCA should be extended to those claimants whose "own work and employment" have "a realistically significant relationship to 'traditional maritime activity involving navigation and commerce on navigable waters.'" *Weyerhaeuser*, 528 F.2d at 961 (quoting *Executive Jet Aviation, Inc.* v. *City of Cleveland*, 409 U.S. 249, 272 (1972)).

On three separate occasions, this Court has reversed lower court decisions that applied the "significant relationship" standard. *Director, OWCP* v. *Perini North River Assocs.*, 459 U.S. 297 (1983); *Herb's Welding, supra*; *Schwalb, supra.* In two of these cases, the lower court had denied coverage under the "significant relationship" test, while this Court extended coverage under the standard that it applied. Thus in *Perini*, the Court held covered a construction worker building a sewage treatment plant extending over the Hudson River, because his injury on actual navigable waters would have been covered before the 1972 amendments. 459 U.S. at 315. In so holding, the Court reversed a Second Cir-

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longshoring process. See *Herb's Welding*, 470 U.S. at 423-424; Office of Workers' Compensation Programs, Employment Standards Admin., U.S. Dep't of Labor, *LHWCA Program Memorandum No. 58, Guidelines for Determination of Coverage of Claims Under Amended Longshoremen's Act* 11-12 (Aug. 10, 1977).

cuit decision denying coverage because that employment lacked a "significant relationship to navigation or to commerce on navigable waters." 459 U.S. at 301; see also *id.* at 302 & n.8, 318-319 & n.27, 320 n.29.

Similarly, in *Schwalb*, the Supreme Court of Virginia had applied the "significant relationship" standard to deny coverage to workers involved in the maintenance and repair of machinery used to transfer coal from rail cars to ships. *Schwalb* v. *Chesapeake & O. Ry.*, 235 Va. 27, 30-33, 365 S.E. 2d 742, 744-745 (1988). This Court reversed, declaring itself "quite sure that employees who are injured while maintaining or repairing equipment essential to the loading or unloading process are covered by the Act. Such employees are engaged in activity that is an integral part of and essential to those overall processes. That is all that § 902(3) requires." 110 S. Ct. at 385.[4]

Finally, in *Herb's Welding*, this Court reversed a Fifth Circuit decision that had used the "significant relationship" test to extend LHWCA coverage to a welder injured on a fixed offshore oil drilling platform in Louisiana territorial waters. 470 U.S. at 418-419. The Court noted that "maritime employ-

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[4] In view of the results in *Perini* and *Schwalb*, we disagree with the court of appeals' statement (Pet. App. A12) that this Court, in rejecting the "significant relationship" test, has accepted a "more restrictive standard." See also Pet. App. A11 (arguing that this Court has rejected "more expansive interpretations of the Act"). This Court held in *Northeast Marine Terminal Co.* that the "language of the 1972 Amendments is broad and suggests that we should take an expansive view of the extended coverage." 432 U.S. at 268. Indeed, in *Schwalb*, the error of the Virginia Supreme Court lay in its overly restrictive view of what constitutes an "essential" or "integral" part of loading and unloading ships.

ment" cannot be read "to eliminate any requirement of a connection with the loading or construction of ships." *Id.* at 423-424. In this instance, the Court held that the claimant's work as a welder had "nothing to do with the loading or unloading process" and was not "inherently maritime" in nature. *Id.* at 425.

It is evident that this Court has never found the *Weyerhaeuser* "significant relationship" test to be a consistent guide in determining the scope of LHWCA coverage, much less "a coverage beacon that ha[s] shone steadily since 1975," as petitioner claims (Pet. 8). Instead, in cases involving cargo-handling operations, the Court has repeatedly applied "an occupational test focusing on loading and unloading." *Schwalb*, 110 S. Ct. at 385.

In accordance with these pronouncements, the courts of appeals have adopted the same approach. See *Schwalb*, 110 S. Ct. at 384, 385 (noting that federal courts uniformly disagreed with "significant relationship" approach adopted by Virginia state court and citing cases). Petitioner's contention (Pet. 8-9) that an Eleventh Circuit decision, *Sanders* v. *Alabama Dry Dock & Shipbuilding Co.*, 841 F.2d 1085, 1088 (1988), disrupts this uniformity is without merit. While the court in *Sanders* referred to an older Fifth Circuit case that employed the "significant relationship" test (841 F.2d at 1088 (quoting *Odom Constr. Co.* v. *United States Dep't of Labor*, 622 F.2d 110 (1980), cert. denied, 450 U.S. 966 (1981)), it ultimately applied a functional approach, concluding that "Sanders' responsibilities [as an industrial relations specialist] significantly related to and directly furthered ADDSCO's ongoing shipbuilding and ship repair operations." 841 F.2d at 1088. In any case, the Eleventh Circuit has recently reiterated that

the "*Schwalb* test supersedes any differing standard previously used by this court," including the significant relationship test articulated in *Sanders*. See *Atlantic Container Serv., Inc.* v. *Coleman*, 904 F.2d 611, 618 n.5 (1990); see also *Browning* v. *B.F. Diamond Constr. Co.*, 676 F.2d 547, 549-550 (11th Cir. 1982) (relying on "loading and unloading" test), cert. denied, 459 U.S. 1170 (1983).[5]

2. Petitioner asserts (Pet. 12-14) that this Court needs to clarify whether workers other than "longshoremen, ship repairmen, shipbuilders and shipbreakers" are covered by the Act, or whether only those engaged in "loading, unloading, repairing or building a vessel" are covered.

Insofar as petitioner's claim is a restatement of the contention that this Court has not clearly rejected the *Weyerhaeuser* standard (see Pet. 13-14), it is without merit for the reasons reviewed above. Insofar as petitioner's assertion is that this Court's opinions provide conflicting information concerning the scope of the status test, it also fails. This Court has made clear that " 'maritime employment' is not limited to the occupations specifically mentioned in § 2 (3)." *Herb's Welding*, 470 U.S. at 423; see also *Schwalb*, 110 S. Ct. at 384. As we have explained above, this Court's decisions also cover those employees whose work contributes in an integral or essential way to the functions performed by longshoremen

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[5] *Union Texas Petroleum Corp.* v. *PLT Engineering, Inc.*, 895 F.2d 1043 (1990), the Fifth Circuit decision that petitioner alleges (Pet. 8-9) to have "compounded th[e] conflict" caused by *Sanders*, is not even an LHWCA case, and merely paraphrases the *Weyerhaeuser* test in a footnote that can only be characterized as dictum. 895 F.2d at 1049 n.9.

and harbor workers, including ship repairmen, shipbuilders and shipbreakers.[6]

Finally, to the extent that petitioner argues that the court of appeals wrongly applied the "integral or essential part" standard in this case, he presents a fact-bound issue that does not warrant review by this Court. The ALJ (Pet. App. A30), the Benefits Review Board (Pet. App. A16), and the court of appeals (Pet. App. A13) have all specifically concluded that, while the Seagull Inn served some tanker crew members whose work involved loading and unloading cargo, its operation was not "essential" to the loading and unloading operation.[7] Petitioner has not claimed that he performed any role independent of his work in the restaurant that was "essential" to other longshoring, ship repair, shipbuilding, or shipbreaking work by his employer.[8] The conclusion that petitioner was not engaged in "maritime employment" thus warrants no further review.

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[6] As the Court made clear in *Perini, supra,* the LHWCA also covers workers injured over water who would have been covered before 1972.

[7] We do not here endorse the court of appeals' reliance on the fact that because the Seagull Inn closed in 1982, and "Chevron has not been forced to shut down its operations" (Pet. App. A13), it is clear that work in the restaurant before 1982 was not "essential to the loading and unloading process" (Pet. App. A14). The more pertinent inquiry, in our view, is whether during his employment by respondent, claimant's work was integral or essential to his employer's cargo transfer functions. See Pet. App. A16.

[8] Indeed, the Benefits Review Board ruled (Pet. App. A22) that even under the less focused *Weyerhaeuser* standard, petitioner's work did not satisfy the status requirement of the Act.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1990

☆ U. S. GOVERNMENT PRINTING OFFICE: 1990 262203 20081